SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 783.

HUBERT WORK, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, EX REL. LOGAN RIVES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

a SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THE UNITED STATES OF AMERICA, EX REL. Logan Rives, Petitioner, *v.* ALBERT B. FALL, SECRETARY OF THE INTERIOR, Respondent. } At law No. 67276.

UNITED STATES OF AMERICA, *District of Columbia.* } ss.

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 PETITION FOR MANDAMUS.

(Filed January 22, 1923.)

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, EX REL. Logan Rives, *v.* ALBERT B. FALL, SECRETARY OF THE INTERIOR. } At law No. 67276.

The petition of the United States on the relation of Logan Rives respectfully represents:

I. That the petitioner, Logan Rives, is a citizen of the State of California and brings this petition for a writ of mandamus against the respondent, Albert B. Fall, a citizen of the State of New Mexico residing in the District of Columbia.

II. The said Albert B. Fall, respondent, was at the several times hereinafter referred to, and still is, Secretary of the Interior of the United States, and as such charged with the administration of the laws of the United States relative to the war minerals relief claims, and especially section 5 of the act of March 2, 1919 (40 Stat. 1272) as amended by the act of November 23, 1921 (Public 99), and is sued in his official capacity as Secretary of the Interior as aforesaid.

III. The said respondent as Secretary of the Interior is, under said section 5 of the act of March 2, 1919, a copy of which is attached to this petition as Exhibit "A,"

2 "authorized to adjust, liquidate and pay such net losses as have been suffered by any person, firm or corporation, by reason of producing or preparing to produce * * * manganese * * * in compliance with the request or demand of the Department of the Interior * * * to supply the urgent needs of the nation in the prosecution of the war * * *.

"The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final; * * *

"And provided further, That said Secretary shall consider, approve and dispose of only such claims as shall be made here-

under and filed with the Department of Interior within three months from and after the approval of this act; * * *

"And provided further, That no claim shall be allowed or paid by the said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made, or obligations so incurred by the claimant, were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance."

IV. The petitioner, during the months of June and July, 1918, in preparing to produce manganese in compliance with the request of the Department of the Interior to supply the urgent needs of the nation in the prosecution of the war, agreed to buy two tracts of land known as the "Clark Tract," and the "George Tract," situated near Batesville, Ark., containing manganese in sufficient quantities to be of commercial importance, and made initial payments on said purchase of $9,600; and on November 4, 1918, the petitioner leased other property containing manganese in sufficient quantities to be of commercial importance, and purchased certain machinery for the operation of these properties. Upon the signing of the armistice

3 there was due by the petitioner upon the purchase price of said land, under his agreements, the sum of $11,000, but there then being no further demand for manganese this land had no value whatever as mineral land, and its market or other value was far less than the balance due on the purchase price, and did not exceed the sum of $1,000. The petitioner, therefore, to save further loss, elected under his said contracts of purchase, to lose, as liquidated damages, the said sum of $9,600 rather than to pay the $11,000 still due for property then worth only the said sum of $1,000. The said sum of $9,600, therefore, is a net loss to the petitioner in preparing to produce said minerals upon the request of the Interior Department to supply the urgent need of the nation in the prosecution of the war.

V. The Secretary of the Interior, acting under the provisions of said section 5 of the act of March 2, 1919, organized the War Minerals Relief Commission in the Department of the Interior for the consideration of claims arising under said act, and promulgated certain regulations governing the filing and adjudication of such claims; and the petitioner, in accordance with said act and the said regulations, on or before June 2, 1919, filed in the office of the Secretary of the Interior, Washington, D. C., his claim for net losses suffered by reason of producing or preparing to produce manganese in compliance with the request of the Department of the Interior to supply the urgent needs of the Nation in the prosecution of the war.

4 The petitioner's claim was numbered by the said Secretary of Interior as Claim No. 346, and aggregated the sum of $55,204.15; which included among other items the said sum of $9,600, petitioner's net loss for the "George" and "Clark" tracts of land, as set out in paragraph IV herein. The petitioner's said claim, other than the said net loss of $9,600 for said land, was considered by the said War Minerals Relief Commission, and on February 12, 1920, said commission recommended to the Secretary the payment to the petitioner of the sum of $23,047.36; and upon this recommendation an award was made your petitioner by the Secretary of Interior March 4, 1920, in said last-mentioned amount. Copy of the findings

of said commission of February 12, 1920, is attached to this petition as Exhibit "B," and copy of the award of March 4, 1920, is attached to this petition as Exhibit "C." The petitioner filed under the said amendatory act of November 23, 1921, before said respondent Secretary of Interior, a petition requesting a rehearing of his refusal to consider said claim for $9,600 expended for said two tracts of land, but upon consideration the War Minerals Commission on October 31, 1922, again determined that "expenditure incident to the purchase of property * * * is not repayable under the law." This determination was approved by the said respondent November 21, 1922. Copies of the opinions of said commission of October 31, 1922, and of said respondent of November 21, 1922, are attached hereto as Exhibits "D" and "E," respectively.

VI. From these said exhibits it appears that the said Secretary of Interior found (1) that the petitioner suffered net losses in preparing to produce manganese; (2) that in thus preparing to produce said minerals petitioner acted upon the request of the Department of the Interior, and (3) that the expenditures made by the petitioner were made in good faith, and (4) were for or upon properties containing manganese in sufficient quantities to be of commercial importance. While making these several findings as aforesaid, said Secretary of the Interior failed and refused to take jurisdiction of the said claim for the net loss of $9,600 suffered by your petitioner for the said "George" and "Clark" tracts of land on the ground that net losses in preparing to produce manganese, occasioned by expenditures or obligations incurred in the purchase of property containing manganese in sufficient quantities to be of commercial importance, did not come within the provisions of said act of March 2, 1919, and said respondent was without authority to consider the same.

VII. Your petitioner shows that the respondent's refusal to adjudicate petitioner's expenditures in good faith for property admittedly containing manganese in sufficient quantities to be of commercial importance, and respondent's denial of his power and authority to adjust and pay petitioner's net loss thus arising, is a clear mistake and plain misunderstanding of the unambiguous terms of said section 5 of the act of March 2, 1919, and respondent's nonaction can be reviewed, and his nullification of the law corrected, only by mandamus.

VIII. Wherefore petitioner prays:

1. That a writ of mandamus may be issued directing the respondent, Albert B. Fall, Secretary of the Interior, to take jurisdiction of the petitioner's claim for expenditures made and obligations incurred in good faith for the said tracts of land containing manganese in sufficient quantities to be of commercial importance, to allow such sum as may be just and equitable to adjust and pay petitioner's net losses, if any, thus arising in preparing to produce manganese at the request of the Department of the Interior, and to ascertain the amount thereof.

2. That a rule may issue requiring respondent, Albert B. Fall, Secretary of Interior, to show cause, if any he can, why the writ of mandamus should not issue herein as prayed.

LOGAN RIVES.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss.

Logan Rives, being duly sworn, deposes and says that he is the petitioner herein; that he has read and knows the allegations in said petition to be true, except such matters as are alleged on information and belief, and as to those he believes them to be true.

LOGAN RIVES.

Subscribed and sworn to before me this 3d day of January, 1923.

[SEAL.] MINNA MCGARVEY,
Notary Public.

My commission expires Dec. 5, 1926.

LESLIE C. GARNETT, *Attorney.*

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7 EXHIBIT "A."

Section 5 of the Act of Congress entitled "An Act to Provide Relief in Cases of Contracts Connected with the Prosecution of the War and for Other Purposes," approved March 2, 1919.

"SECTION 5.—That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce, either manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war; said minerals being enumerated in the Act of Congress approved October fifth, nineteen hundred and eighteen, entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply.'

"The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence expenses, supplies, postage, printing, and all other expenses incident to the proper prosecution of this work, both in the District of Columbia and elsewhere, as the Secretary of the Interior may deem essential and proper, shall be paid from the funds appropriated by the said Act of October fifth, nineteen hundred and eighteen, and that said funds and appropriations shall continue to be available for said purpose until such time as the said Secretary shall have fully exercised the authority herein granted and performed and completed the duties hereby provided and imposed: *Provided, however,* That the payments and disbursements made under the provisions of this section for and in connection with the payments and settlements of the claims herein described, and the said expenses of administration shall in no event exceed the sum of

$8,500,000: *And provided further*, That said Secretary shall consider, approve, and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act: *And provided further*, That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance: *And provided further*, That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April sixth, nineteen hundred and seventeen, and
8 prior to November twelfth, nineteen hundred and eighteen, in a legitimate attempt to produce either manganese, chrome, pyrites, or tungsten for the needs of the Nation for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claims, and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary: *And provided further*, That the settlement of any claim arising under the provisions of this section shall not bar the United States Government, through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right to recover any money paid by the Government to any party under and by virtue of the provisions of this section, if the Government has been defrauded, and the right of recovery in all such cases shall extend to the executors, administrators, heirs, and assigns of any party.

"That a report of all operations under this section, including receipts and disbursements, shall be made to Congress on or before the first Monday in December of each year.

"That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States: *Provided further*, That in determining the net losses of any claimant the Secretary of the Interior shall, among other things, take into consideration and charge to the claimant the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid."

EXHIBIT "B."

Claim No. 346.

February 12, 1920.

The Honorable FRANK K. LANE,
Secretary of the Interior.

Claim No. 346. In the matter of the claim of Logan Rives, Batesville, Arkansas; Manganese, $42,289.01.

DEAR SIR: With reference to Claim No. 346 of Logan Rives, valid Government request to produce manganese is claimed through per-

sonal conversation with E. D. Miser, of the Geological Survey,
9 and W. R. Crane, of the Bureau of Mines, and such request is admitted. The date of first request was in June, 1918, prior to purchase of properties and machinery by claimant. It may be conceded, therefore, that all the operations were conducted in compliance with Government request.

During June and July, 1918, claimant agreed to buy two tracts of land, known as the "Clark Tract" and the "George Tract," situated near Batesville, Arkansas, partial payment on the lands, amounting to $9,500, was made, but after the signing of the armistice claimant elected to forfeit his payment and did not complete purchase. The amount paid on purchase of land has been deducted from the amount of the claim (see statement attached).

On November 4, claimant leased the Adler Mine from the Bill-Jim Mineral Company and purchased machinery for its operation, but, owing to the closing of the war, did not operate this property.

Shortly after November 11, claimant disposed of all machinery to advantage, realizing for it $22,088.20. The cost of salvaging this machinery was $3,164.39. This expenditure was made after November 11, but is considered a proper charge against salvage. In other words, it was necessary to spend this money in labor and freight in order to obtain the salvage money. If it is to be deducted then the salvage value should be lessened by the same amount.

The following statements show what the commission considers a justifiable award in this case:

Gross claim		$55,204.15
From this gross claim the following deductions are recommended:		
Supplies.—(This item is included in purchase price of two Keystone drills)	$199.40	
To Adams & Shell for land options	100.00	
(This item is included in general expense item $2,244.60 and is not admissible as it may be classed with purchase price of property.)		
Error in cost of Keystone shovels	106.00	
Purchase price of land	9,500.00	
Salvage value of machinery sold by claimant	22,088.20	
Ore sold	11,126.94	
Salvage value of ore on hand	72.00	
		33,192.54
Total deductions		22,011.61
Additions.—The cash records of claimant show the following items of justifiable expense not included in questionnaire:		
Labor	427.06	
10 Claimant is also entitled to an expense allowance of $4.00 per day, July 10 to November 11, inclusive, 124 days	496.00	
Claimant is also entitled to a royalty of 10 per cent on the ore shipped	112.69	
		1,035.75
Total justifiable claim		23,047.36

The commission recommend an award of $23,047.36 be made to claimant in full settlement of this claim.

JOHN F. SHAFROTH,
PHILIP N. MOORE,
HORACE G. POMEROY,
Commissioners.

EXHIBIT "C."

MARCH 4, 1920.

In re LOGAN RIVES. } Claim No. 346.

The above is a claim under the war minerals relief act (section 5, act of March 2, 1919, 40 Stat. 1272). The law authorizes compensation for losses incurred in the production of manganese during the war due to stimulation by the Government.

Here there was such stimulation. I have considered the record and an award of twenty-three thousand and forty-seven dollars and thirty-six cents ($23,047.36) is made, as recommended by the War Minerals Relief Commission.

(Signed) ALEXANDER T. VOGELSANG,
Acting Secretary.

EXHIBIT "D."

OCTOBER 31, 1922.

Memorandum in review of: Claim No. 346. Logan Rives, Los Angeles, Calif. Manganese.

This is the claim of Logan Rives under section 5 of the act of March 2, 1919 (40 Stat. 1272), as amended by the act of November 23, 1921 (Public 00).

Commercial importance and stimulation were conceded by the former commission and an award of $23,047.36 was made by the department.

11 In the adjustment of the claim an item of $9,500 for purchase of property was disallowed.

Claimant, on January 9, 1922, filed a motion for rehearing under the amendment in which he asks for reconsideration of the item referred to. No other matter is presented. Before beginning operations in June and July, 1918, claimant agreed to buy two tracts of manganese land known as the Clark Tract and the George Tract, situated near Batesville, Ark. Partial payment on these lands amounting to $9,500 was made, but after the signing of the Armistice claimant elected to forfeit his payment and did not complete the purchase.

Claimant contends in his motion for rehearing that the money spent did not result in a permanent investment, and that therefore this case may be differentiated from those in which there is an outright and complete purchase of property.

A copy of the agreement between the claimant and the owners of the property involved has been examined and found to be ordinary contract of sale of real estate, under which partial payment was made. The item involved is clearly an expenditure incident to the purchase of property, and therefore is not payable under the law.

Provision for repayment for such losses was stricken from the original War Minerals Bill and the amendment affords no relief in this respect.

It is accordingly recommended that this claim be disallowed.

JOHN BRIAR,
Assistant Commissioner.

Exhibit "E."

DEPARTMENT OF THE INTERIOR,
W 234 *Washington, D. C., Nov. 21, 1922.*

LOGAN RIVES { Claim No. 346.
War minerals relief act.
Affirmed.

Appeal from the War Minerals Relief Commissioner.

This claim was considered by the original commission and eliminating an item of $9,500 for purchase of property an award was recommended of $23,047.36, which was paid.

Claimant filed motion for rehearing under the provisions of the amendatory act of November 23, 1921 (Pub. #99, 67th Congress), contending that the aforesaid expenditure for property was within the purview of the law. This was denied by the War Minerals Relief Commissioner and exceptions have been filed.

12 The proposition has been repeatedly urged before the department and it has uniformly been held that the law does not contemplate reimbursement for expenditures of this nature; that is, for properties or mining rights. This ruling will not be changed and the decision of the commissioner is affirmed.

E. C. FINNEY,
First Assistant Secretary.

Rule to show cause.

(Filed January 22, 1923.)

* * * * * * *

Upon consideration of the petition filed in the above-entitled case it is by the court this 22d day of January, 1923, ordered:

That the respondent, Albert B. Fall, Secretary of the Interior, be, and he hereby is, required to show cause, if any he can, on or before the 23d day of February, 1923, at 10 o'clock a. m., why the writ of mandamus should not issue as in the petition prayed: *Provided*, That a copy of said petition and of this order be served upon said respondent on or before the 30th day of January, 1923.

WILLIAM HITZ, *Justice.*

Marshal's return.

Served a copy of the within rule on Albert Fall, Secretary of Interior, personally, January 24, 1923.

E. C. SNYDER, *U. S. Marshal.*
K

13 *Respondent's answer.*

(Filed February 20, 1923.)

* * * * * * *

Comes now the respondent and in answer to relator's petition herein filed, as well as by way of return to the rule to show cause herein issued, says:

1–3. He admits the averments of paragraphs 1, 2, and 3.

4–5. Answering the averments of paragraphs 4 and 5, he states that he has no information concerning the same other than as follows: That the records of the Interior Department show that relator, in filing his claim under the War Minerals Relief Act, credited himself, among other things, with the sum of $9,500 which he stated was the amount of money paid by him on account of the purchase price of land mentioned in said paragraphs, and the further sum of $100 paid on account of "land options," that on February 12, 1920, the then existing War Minerals Relief Commission made its findings and recommendations upon said claim addressed to the Secretary of the Interior; that said report showed that the total amount of relator's claim was $55,204.15; that the said commission passed upon and disallowed certain items composing said claim and among these items so disallowed was the sum of $9,600, the amount paid on account of the purchase price of land as aforesaid; that after making certain other deductions from the gross amount of the claim said commission found that the net justifiable claim amounted to $23,047.36, and recommended an award to the relator in that sum in full settlement
of his claim; that pursuant to the rules of practice duly pre-
14 scribed for the presentation and prosecution of claims under said War Minerals Relief Act, relator was duly notified of his right to file comments or objections to said findings and recommendation of said commission; that on February 25, 1920, relator wrote and signed, and subsequently filed his acceptance of said award and recommendation and requested that the same be submitted to the Secretary of the Interior for his approval; that on March 3, 1920, relator by his attorney filed with said commission his acquiesence in the ward, requesting prompt payment thereof, and stating that he did not "waive any right to further award under any additional remedial legislation which may be passed and which might permit further payment"; and that on March 4, 1920, the Acting Secretary of the Interior passed upon said award and recommendation, found that relator's production of manganese on which his claim was based was due to stimulation by the Government and awarded the sum of $23,047.36 to relator in settlement of his said claim for losses sustained, which sum was duly paid to and accepted by the relator.

He further avers that thereafter and on November 23, 1921, Congress passed an act amendatory of said War Minerals Relief Act by amending a portion of section 5 thereof so as to read:

Provided, That all claimants who, in response to any personal, written, or published request, demand, solicitation, or appeal from any of the Government agencies mentioned in said act, in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said act, if the proof in support of said claims clearly shows them to be based upon action taken in response to such request, demand, solicitation or appeal, shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said act.

15 If in claims passed upon under said act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts."

That the said amendment was passed to overcome and offset a certain ruling made by the Attorney General excluding from the relief afforded by said War Minerals Relief Act those who were stimulated to produce the minerals enumerated in said act by general solicitation or appeal only and not by specific request or demand upon the part of anyone of the departments or boards mentioned in said act; that subsequent to the passage of said amendatory act, to wit, on January 7, 1922, the relator by his attorney filed a motion with the War Minerals Relief Commissioner asking rehearing and reconsideration of his claim, excepting to the disallowance of the items forming the subject matter of complaint in relator's petition herein, and in particular the item of $9,500 aforesaid; that reconsideration was accorded and the subject matter of relator's claim was again considered by the War Minerals Relief Commissioner, who on October 31, 1922, adhered to former rulings, held that money spent in the purchase of real estate or on a contract for the purchase of real estate is not repayable as a loss under the law, either as originally passed or in the amendatory form, and disallowed said claim. Whereupon, relator by his attorney, appealed from the decision of said Commissioner to the respondent who, after due consideration thereof, on November 21, 1922, through his First Assistant Secretary, affirmed the said ruling of the Commissioner.

6. Answering the averments of paragraph 6 he admits that the Secretary of the Interior found that relator suffered net losses

16 in preparing to produce manganese; that his production of said mineral was in response to a request by the Interior Department, that such expenditures as were allowed were made in good faith, and that such expenditures as were allowed were made upon or in relation to properties containing manganese in sufficient quantities to be of commercial importance; but he denies that in making the several findings referred to in the petition or in this answer, the Secretary of the Interior failed and refused to take jurisdiction of said claim for the net loss of $9,600 as aforesaid, and on the contrary avers the fact to be that he did take jurisdiction of relator's entire claim, including said items of $9,600 and gave consideration to every item thereof, allowing such items as properly came within the scope

of the act and disallowing for cause deemed by him to be good such items as were not elements in fixing the amount that should be allowed and awarded as just and equitable.

7. In so far as paragraph 7 of the petition may be deemed to contain averments of fact, he denies the same.

Answering the petition generally, he says that he took full jurisdiction over relator's entire claim, gave to each and every item due consideration, and made an adjustment and caused payment to be made to the relator of such part of his claim as he determined was just and equitable, and that his decision in making such adjustment and payment is conclusive and final, and not subject to review by this or any court in this or any form of proceeding. He further shows that any further allowance ordered by the court would in effect constitute a judgment for such sum so adjudged to be due against the United States which is not a party to this action and which has not consented in this behalf to be sued.

17 Wherefore, having made full and complete answer to the petition, he prays that the rule herein issued may be discharged, that the petition may be dismissed with his reasonable costs, and that he may be permitted to depart hence without day.

ALBERT B. FALL,
Secretary of the Interior.

EDWIN S. BOOTH,
Solicitor.
C. EDWD. WRIGHT,
Attorney.

DISTRICT OF COLUMBIA, *ss:*

Albert B. Fall, Secretary of the Interior, on oath says that he has read over the aforegoing answer and is acquainted with the contents; that he is informed that the matters of fact therein set forth are true, and that he believes them to be true.

ALBERT B. FALL,
Secretary of the Interior.

Subscribed and sworn to this 19th day of February, 1923, before me.

[SEAL.]

H. G. CLUNN,
Notary Public in and for the District of Columbia.

Demurrer.

(Filed February 26, 1923.)

* * * * * * *

Comes now the relator by his attorney and says that the answer of the defendant to the rule to show cause issued in the above cause is bad in substance.

NOTE.—Points to be argued.

18 1. The respondent's ruling that "money spent in the purchase of real estate, or on a contract for the purchase of real estate, is not repayable as a loss under the law" is plainly erroneous and amounts to a refusal to take jurisdiction of the petitioner's claim

or to exercise, relative thereto, any discretion under the statute, and is a nullification of the plain intention of Congress.

2. Mandamus is the appropriate remedy to compel the respondent to take jurisdiction of the petitioner's claim, to hear proof, to ascertain the petitioner's loss, if any, and to pay the amount thereof.

LESLIE C. GARNETT,
Attorney for the relator.

To C. EDWARD WRIGHT, Esq.,
Attorney for the respondent:

Take notice that the foregoing demurrer will be for hearing on the *2nd* day of March, 1923, at ten o'clock a. m., or as soon thereafter as same may be heard.

LESLIE C. GARNETT,
Attorney for the relator.

Memorandum.

MARCH 13, 1923.

Order substituting Hubert Work, Secretary of the Interior, as respondent in the place and stead of Albert B. Fall, resigned, filed.

19 SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Friday, April 6, 1923.

Session resumed pursuant to adjournment, Mr. Justice HITZ presiding.

* * * * * * * *

Upon consideration of the demurrer filed herein to the answer of respondent, it is ordered that said demurrer be and the same is hereby sustained.

Monday, April 16, 1923.

Session resumed pursuant to adjournment, Mr. Justice HITZ presiding.

* * * * * * * *

This cause came on to be heard upon the petition of the relator, the rule to show cause, the answer of the respondent to the said petition and rule, and the demurrer to the said answer, and after argument of counsel, was submitted to the court.

Whereupon, the court being of opinion that the relator, having at the request of the Government in good faith produced or prepared to produce manganese for the needs of the Nation in the prosecution of the war, his net losses arising from his contract to purchase property containing such manganese in sufficient quantities to be of commercial importance are repayable under the act of March 3, 1919 (40 Stat. 1272), and that the respondent Secretary of the Interior is authorized to consider relator's expenditures upon his contract to purchase such property, and to adjust, liquidate, and pay such net losses, if any, thus arising, doth sustain the said demurrer.

20 And the said respondent, by his said attorney, electing to stand upon said answer, it is ordered and adjudged that the prayers of the petition be, and the same are, hereby granted, and that a writ of mandamus be issued herein directed to the respondent

commanding him to take jurisdiction of the relator's claim under the said act of March 3, 1919, for net losses arising from his contract to purchase, at the request of the Government, and in good faith, property containing manganese in sufficient quantities to be of commercial importance; to consider under this court's construction of respondent's authority under the statute relator's expenditures upon his contract to purchase said property; to hear proof thereon; and to allow such sum as may be just and equitable to liquidate and pay such net losses, if any, thus arising. It is further ordered and adjudged that the petitioner recover of said respondent his costs in this behalf expended.

From the foregoing, the respondent, by his said attorneys in open court, notes an appeal to the Court of Appeals of the District of Columbia.

Assignment of errors.

(Filed April 18, 1923.)

* * * * * * *

The appellant assigns the following errors in the decision and judgment of the court:

1. The court erred in taking jurisdiction to review the Secretary of the Interior in a matter wholly within the jurisdiction of the latter and in which his judgment is by statute made final and conclusive.

2. The court erred in failing to find and to hold that Congress, in the act of March 2, 1921 (40 Stat., 1272), intended to exclude, in the computation of losses moneys paid on account of purchase price of real estate containing manganese or the other minerals mentioned in said act.

3. The court erred in holding that relator's alleged losses arising from his contract to purchase property said to contain manganese are repayable under the act of March 2, 1919.

4. The court erred in failing to hold that relator, in accepting the award made to him by the respondent in settlement of his claim for losses incurred under the conditions prescribed by said act of March 2, 1919, is barred from reopening said claim or making further claim on account of the items disallowed by the respondent in said former adjudication.

5. The court erred in failing to hold that the act of November 23, 1921, did not enlarge relator's rights to recover and did not afford him any new or additional remedy permitting any payment not theretofore allowable under the act of March 2, 1919.

6. The court erred in failing to hold that this is in substance a suit against the United States.

7. The court erred in sustaining the demurrer to the answer and in directing the substitution of its judgment and construction of the law for that of the respondent and in requiring the respondent to make further allowance and payment to the relator under the court's construction and views as to what is justly and equitably repayable under the terms of the act of March 2, 1919.

8. The court erred in failing to dismiss the petition.

C. EDWARD WRIGHT,
Attorney for Respondent.

22 *Designation of record.*

(Filed April 18, 1923.)

* * * * * * *

The clerk in preparing the transcript of record on appeal will please to include therein the following:

1. The petition and rule to show cause.
2. The respondent's answer.
3. The relator's demurrer.
4. The order sustaining the demurrer and the judgment awarding the writ of mandamus, together with notation of appeal.
5. The assignment of errors.
6. This designation.

C. EDWARD WRIGHT,
Attorney for Respondent.

Service acknowledged this 18th day of April, 1923.

LESLIE C. GARNETT,
Attorney for Relator.

23 SUPREME COURT OF THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA, *District of Columbia.* } *ss.*

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 22, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 67276 at Law, wherein The United States of America, ex rel. Logan Rives is petitioner and Albert B. Fall, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of July, 1923.

[SEAL.]

MORGAN H. BEACH,
Clerk.

By W. E. WILLIAMS,
Asst. Clerk.

[Indorsed: District of Columbia Supreme Court. No. 4020. Hurbert Work, Secretary of the Interior, appellant, *vs.* The United States of America, ex rel. Logan Rives. Filed July 24, 1923. Henry W. Hodges, Clerk.]

15 COURT OF APPEALS OF DISTRICT OF COLUMBIA.

Argument.

Friday, October 5th, A. D. 1923.

HUBERT WORK, SECRETARY OF THE INTERIOR, APPELLANT,
vs.
THE UNITED STATES OF AMERICA, EX REL. LOGAN RIVES. } No. 4020.

The argument in the above-entitled cause was commenced by Mr. C. E. Wright, attorney for the appellant, and was continued by Mr. Leslie C. Garnett, attorney for the appellee, and was concluded by Mr. C. E. Wright, attorney for the appellant.

16 In the Court of Appeals of the District of Columbia.

[Title omitted.]

Opinion.

SMYTH, Chief Justice: The Secretary of the Interior appeals from a judgment of the Supreme Court of the District of Columbia awarding a mandamus against him by which he is directed to take jurisdiction of a claim filed with him by the relator, Logan Rives, under section 5 of the act of Congress approved March 2, 1919 (40 Stat. 1272), as amended by the act of November 23, 1921 (42 Stat. 322).

By section 5 just mentioned, before it was amended, the Secretary was authorized "to adjust, liquidate, and pay such net losses as have been suffered by any person * * * by reason of producing or preparing to produce * * * manganese * * * in compliance with the request or demand of the Department of the Interior * * * to supply the urgent needs of the Nation in the prosecution of the war;" and to "make such adjustments and payments in each case as he shall determine to be just and equitable." It is
17 further provided that no claim shall be allowed or paid "unless it shall appear to the satisfaction of the * * * Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese * * * in sufficient quantities to be of commercial importance." And his decision is made "conclusive and final" by the act.

The relator stated that during the months of June and July, 1918, in preparing to produce manganese in compliance with the request of the Department of the Interior to supply the urgent needs of the Nation in the prosecution of the war, he agreed to buy two tracts of land situated near Batesville, Arkansas, containing manganese in sufficient quantities to be of commercial importance, and made initial payment on the purchase of $9,600; that upon the signing of the

armistice there was due by the petitioner on the purchase price of the land the sum of $11,000, but since there was then no further demand for manganese, the land was not worth to exceed $1,000; that to save himself further loss he elected under his contract of purchase to lose as liquidated damages the sum which he had paid on the purchase, namely, $9,600, and that this sum was a net loss to him. He filed with the Secretary under the act just mentioned a claim embodying several items which aggregated $55,204.15. Among them was the $9,600 item. The Secretary allowed a number of the items but rejected the one for $9,600. In accepting the award and requesting payment thereof the relator stated that he did not waive any right to further award under any additional remedial legislation which might be passed, and which might permit further payment. Payment for the allowed items was made to the relator.

After this Congress amended the act by adding thereunto
18 the following: "That all claimants who, in response to any personal, written, or published request, demand, solicitation, of appeal from any of the Government agencies mentioned in said act, in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said act, if the proof in support of said claims clearly shows them to be based upon action taken in response to such request, demand, solicitation or appeal, shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said act. If in claims passed upon under said act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts." Subsequent to the passage of this amendment relator asked for a rehearing with respect to the $9,600 item and other items. The rehearing was granted, and the Secretary went into the whole matter anew. He held against the relator on the ground that the money spent in the purchase of the real estate was not repayable as a loss under the law either as originally passed or in the amendatory form. With respect to these facts there is no dispute between the parties.

The statute authorized the Secretary to pay such net losses as were suffered by any person by reason of producing or preparing to produce manganese, etc. In purchasing this land the relator was preparing to produce manganese. This is admitted. The statute further says that no claim shall be allowed unless it shall appear that the expenditures made by the claimant "were made in good faith for or upon property which contained * * * manganese," etc. It is
said that money paid in acquiring property for that purpose
19 was not paid "for" property within the meaning of the statute. The controversy seemed to turn upon the meaning of the word "for." In his opinion rejecting the claim the Secretary said that to adopt the view "that the word 'for' means 'for the pur-

chase of property' would exclude" other claims that should be allowed. We do not think this would follow, because the word "for" has many significations according to the lexicographers. In one relation it may mean, as the Secretary says, "for the benefit of" or "for the use of," and in another, "in consideration of." Webster says that in the most general sense it indicates "that in consideration of which * * * anything is done or takes place." The expenditure of the $9,600 was in consideration of the property—therefore was made "for" it. It is a very common thing to say that so much money was paid for this or for that, meaning thereby that it was the consideration passed for the thing mentioned. We are satisfied that under the statute it was the intention of Congress to allow for losses incurred by reason of money paid for property which contained manganese.

Much significance is given to what took place on the floor of the Senate when the bill was being considered, and it is said that because of this the word "for" must be given the restricted meaning attributed to it by the Secretary. But how are we to know whether the same view was taken by the House of Representatives when the bill was before that body? Anyhow it is immaterial. While reference may be made to reports of committees of either House, and even to debates in Congress for the purpose of aiding in the interpretation of an ambiguous measure (United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310, 318, and Wisconsin R. R. Commission v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, 589), there is no authority for consulting those sources of information where, as here, there is no ambiguity. See authorities just cited. In this case the effect of going to the proceedings of Congress would be to create a doubt where none existed before, and this is not allowable. Wisconsin R. R. Commission v. Chicago, B. & Q. R. R. Co., supra, p. 589.

We urged to hold that this is an action against the United States, and that since they have not consented to be sued with respect to the matter it can not be maintained. To this view we can not yield. The action relates simply to the question as to whether or not the Secretary has failed to exercise a power vested in him by Congress. It does not seek to direct him to allow or pay a penny. Such an action in no wise affects the United States. The circumstance that our ruling may result in a finding by the Secretary in favor of the relator is of no importance. It would be merely an accidental. With reference to a situation like this the Supreme Court of the United States, in awarding a mandamus to compel the Interstate Commerce Commission to entertain and proceed to adjudicate a cause, said: "The unusual and purely fortuitous circumstance, that the character of this jurisdictional limitation on the power of the commission chances to be such that the giving of a correct construction to it must result in determining the character of the decision which the commission must render when the case is returned to it, can not affect the power of this court or that of the lower courts to

define what that jurisdiction is under the act of Congress or the duty of the commission to accept and act upon such definition when announced." Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 644.

What we have said meets another contention made by the Secretary, viz, that in rendering his decision construing the statute he was exercising his judgment, and that, as there is some basis for that judgment in the statute, the courts have no power to control
21 his action. While this doctrine is sound where the Secretary takes jurisdiction and then exerts his judgment over the matter to which the jurisdiction extends, it does not apply where he refuses to act, on the assumption that he has no power or jurisdiction over the subject matter. In the case of Louisville Cement Co. v. Interstate Commerce Commission, supra, the commission refused to allow a claim because, as stated, it had not been filed in time under the statute. The court held that it had been and granted the writ of mandamus to compel the commission to entertain and proceed to adjudicate the claim. That is what the court below did in this case.

Another decision which bears on the point is that of Work, Secretary of the Interior, v. Mosier, 261 U. S. 352. There the question was as to whether or not under a statute bonuses paid for oil lands were distributable as rents or as royalties. The relators alleged that the Secretary had placed a wrong construction upon the statute. The court said that the determination of the question was not "a matter of discretionary construction by the Secretary," but was a matter "determinable in court at the instance of the beneficiaries as of right." So here the question as to whether or not money paid for manganese land comes within the purview of the statute is a matter of statutory construction, not finally intrusted to the discretion of the Secretary, but determinable in court at the instance of the claimant. This case was followed in Work v. The United States on the relation of McAlester-Edwards Coal Co., 262 U. S. 200, where the Secretary, construing a statute, denied the right of the coal company to make payments for certain lands and to have a patent issued therefor. The Secretary insisted that since his construction of the statute had some basis therein, it was not reviewable by the courts. This court took a different view of the matter (277 Fed. 573) and was sustained by the Supreme Court of the
22 United States. These decisions represent the latest expressions of the Supreme Court of the United States on the subject, and are binding upon us.

The acceptance of the amount awarded to the relator did not bar him from relief with respect to the $9,600 item. The Secretary granted a rehearing after the acceptance, reconsidered his decision touching the matter, and rejected the item anew. He did not think that the relator was barred from a rehearing by the acceptance, or,

if he did, he waived the bar and proceeded as if it had no existence. If the Secretary had taken jurisdiction of the claim and had rejected it in whole or in part on the ground that it did not represent a loss incurred by him on account of mony paid for manganese property, there would be force in the contention that having accepted the decision of the Secretary he had no right to reopen the matter. But that is not the situation. The Secretary, as we have said, did not go into the merits of the matter at all, but simply refused to touch it, on the ground that he was not authorized to do so.

Apart from that, the amendatory act provides in substance that all claimants who in good faith expended money in producing or preparing to produce any of the ores or minerals named should be reimbursed for such net losses as they had incurred, and that if in claims passed upon under the original act awards had been denied on rulings contrary to the provisions of the amendment the Secretary might award proper amounts or additional amounts. In this case the rulings of the Secretary rejecting relator's claim were contrary to the provisions of the amendment, which, as we have just seen, provided that persons who in good faith expended money in preparing to produce minerals should be reimbursed for such net losses as they had incurred. In view of these considerations we do not think relator was barred by the acceptance.

23 The decision of the trial court in awarding the mandamus is free from error, and it is therefore affirmed, with costs. Affirmed, Jan. 7, 1924.

CONSTANTINE J. SMYTH,
Chief Justice.

24 Court of Appeals of District of Columbia.

Judgment.

Monday, January 7th, A. D. 1924

[Title omitted.]

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. CHIEF JUSTICE SMYTH,
January 7, 1924.

Mr. Associate Justice Jennings Bailey of the Supreme Court of the District of Columbia sat in this case in the place of Mr. Justice Van Orsdel.

25 In the Court of Appeals of the District of Columbia.

Petition for writ of error.

Filed Jan. 23, 1924.

[Title omitted.]

Comes now Hubert Work, Secretary of the Interior, appellant in the above-entitled cause, and respectfully shows that on or about the 7th day of January, 1924, this court entered a judgment herein in favor of the appellee and against the appellant, affirming the judgment of the Supreme Court of the District of Columbia in favor of appellee, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellant, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellant further shows that judgment of the Court of Appeals in this case is subject to review by the Supreme Court of the United States under the provisions of paragraph 5 of section 250 of the Judicial Code in that existence and scope of a power or duty of an officer of the United States, to wit, the Secretary of the Interior, are drawn in question.

The appellant further shows that the judgment of the Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph 6 of said section 250 of the Judicial Code, in that the construction of certain acts of Congress, to wit, the 5th section of the act of March 2, 1919 (40 Stat., 1272), and the act of November 23, 1921 (42 Stat., 322), was drawn in question by the appellant, who was the defendant below, and

26 who asserted and relied upon a construction of said statutes contrary to that placed thereon by the Court of Appeals in its judgment herein.

Wherefore appellant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the mandate of this court be stayed until further order.

HUBERT WORK,
Secretary of the Interior.

By his attorney:

C. EDW. WRIGHT,
Attorney.

27 In the Court of Appeals of the District of Columbia.

[Title omitted.]

Assignment of errors.

Filed Jan. 23, 1924.

And now comes the appellant, by his attorney, and says that in the record and proceedings of the Court of Appeals in the above-entitled cause and in the rendition of the final judgment therein, manifest error has intervened, to the prejudice of said appellant, in this, to wit:

1. The court erred in affirming the judgment below.
2. The court erred in taking jurisdiction to review the Secretary of the Interior in a matter wholly within his jurisdiction and in which his judgment is by the statute made final and conclusive.
3. The court erred in holding that appelle's alleged losses arising from his contract to purchase property said to contain manganese are repayable under the act of March 2, 1919.
4. The court erred in failing to hold that appellee in accepting the award made to him by the Secretary in settlement of his claim is barred from reopening said claim or making further claim on account of items therein disallowed by the Secretary in former adjudications.
5. The court erred in failing to hold that the act of November 23, 1921, did not enlarge appellee's rights to recover and did not afford him any new or additional remedy permitting any payment not therefore allowable under the act of March 2, 1919.
6. The court erred in failing to hold that the Secretary took jurisdiction of appellee's claim and rendered judgment therein as to
28 the amount of net losses by the Secretary deemed to be just and equitable and that the decision of the Secretary in making said allowance was conclusive and final.
7. The court erred in failing to hold that this is in substance a suit against the United States.

C. Edw. Wright,
Attorney for Plaintiff in Error.

29 [File indorsement omitted.]

30 Court of Appeals of District of Columbia.

Order allowing writ of error, etc.

Saturday, January 26th, A. D. 1924.

[File omitted.]

On consideration of the motion for the allowance of a writ of error to remove the above-entitled cause to the Supreme Court of the

United States, and to stay the mandate, it is ordered by the court that said motion be, and the same is hereby, granted.

31 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Hubert Work, Secretary of the Interior, appellant, and the United States of America, ex rel. Logan Rives, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-four.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

32 *Citation in usual form showing service on L. C. Garnett.*

Filed Jan. 28, 1924.

[Omitted in printing.]

33 [File indorsement omitted.]

34 In the Court of Appeals of the District of Columbia.

Designation of record.

Filed Jan. 28, 1924.

The clerk in making up the transcript of record in the removal of the above-entitled cause to the Supreme Court of the United States on a writ of error duly allowed by the court in that behalf will include:

1. The matters contained in the printed transcript of record on appeal, to wit, the petition, rule to show cause, answer, demurrer, order sustaining demurrer, judgment awarding the writ of mandamus, notation of appeal, assignment of errors, and designation.
2. The notation of argument and submission.
3. The opinion of the court delivered through Mr. Chief Justice Smythe.
4. Judgment affirming judgment below.
5. Petition for writ of error.
6. Assignment of errors.
7. Notations of allowance of writ of error and order staying mandate.
8. This designation.

Service acknowledged Jan. 24, 1924.

C. EDWARD WRIGHT,
Attorney for Plaintiff in Error.

LESLIE C. GARNETT,
Atty. for Deft. in Error.

[File indorsement omitted.]

35 Court of Appeals of the District of Columbia.

Clerk's Certificate.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 34, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Hubert Work, Secretary of the Interior, appellant, vs. the United States of America, ex rel. Logan Rives, No. 4020, January term, 1924, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of January, A. D. 1924.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover): File No. 30,093. District of Columbia, Court of Appeals. Term No. 783. Hubert Work, Secretary of the Interior, plaintiff in error, vs. the United States of America, ex rel. Logan Rives. Filed January 31, 1924. File No. 30,093.

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AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1924

HUBERT WORK, SECRETARY OF THE INTERIOR, plaintiff in error *v.* THE UNITED STATES OF AMERICA, EX REL. Logan Rives	No. 272

In error to the Court of Appeals of the District of Columbia

BRIEF FOR THE PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This cause arises from a petition filed in the Supreme Court of the District of Columbia by the defendant in error. Therein he asked a writ of mandamus to the Secretary of the Interior, directing him to take jurisdiction of and to allow certain items in a claim for reimbursement of losses sustained in producing manganese. The nature of this claim and of these items will be stated more particularly hereinafter. Answer was filed, to which the petitioner demurred. The demurrer was sustained, the writ granted, and the Secretary appealed to the Court of Appeals of the District, which affirmed the decision of the trial court. The cause is here on writ of error to the Court of Appeals.

The claim referred to was filed with the Secretary of the Interior under section 5 of an act approved March 2, 1919, authorizing that official "to adjust, liquidate, and pay such losses as have been suffered by any person * * * by reason of producing or preparing to produce * * * manganese * * * in compliance with the request or demand of the Department of the Interior * * *," and providing that the "Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable," and that "the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided." (The limitation here mentioned has no bearing on the present case.) Following the language quoted are six provisos, each, with one exception, limiting the discretion of the Secretary. The third of the provisos—and upon it the defendant in error relies largely—is as follows: "That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese, * * * in sufficient quantities to be of commercial importance." (All of section 5 is set out as Exhibit "A" on page 4 of the Record and also as Appendix "A" of this brief.)

The claim of the defendant in error was for $55,204.15. The two items involved here were for a total of $9,600 ($100 and $9,500), expended for

options ($100) on and in partial payment for two tracts of land containing manganese ($9,500).

Whether the Secretary took jurisdiction of these particular items is one of the questions in the case. What was done respecting them follows (see Answer, page 9 of the Record):

The claim, including these items, having been filed with the Secretary, was referred by him to the War Minerals Relief Commission (a body organized by the Secretary to pass upon claims for him, subject to his approval). The commission "made its findings and recommendations upon said claim addressed to the Secretary of the Interior; that said report showed that the total amount of relator's claim was $55,204.15; that the said commission passed upon and disallowed certain items composing said claim, and among these items so disallowed was the sum of $9,600, the amount paid on account of the purchase price of land as aforesaid; that after making certain other deductions from the gross amount of the claim said commission found that the net justifiable claim amounted to $23,047.36 and recommended an award to the relator in that sum in full settlement of his claim."

Thereafter the claimant was notified of his right to file comments or objections to the proceedings and recommendations of the commission. It does not appear that any were filed by him. On February 25, 1920, he wrote and signed and subsequently filed with the commission his unconditional acceptance of the

award and recommendations. Again, on March 3, 1920, by his attorney, he filed his acquiescence, stating then, however, that he did not "waive any right to further award under any additional remedial legislation which may be passed and which might permit further payment." On March 4, 1920, the Acting Secretary of the Interior, having "considered the record," having given to "each and every item due consideration," made the award of $23,047.36, as recommended, allowing to the relator "such part of his claim as he determined was just and equitable." The amount allowed was paid and accepted. No other facts are stated in the answer relative to this first stage of the proceeding before the Secretary upon this claim.

On November 23, 1921, eighteen months after the allowance and acceptance of the award, Congress passed an amendment to the War Minerals Relief Commission Act, enlarging its scope so as to include within its benefits not only those who had been directly solicited by the Government to produce manganese (and other metals) but those also who had responded to a public solicitation. It did not otherwise change the law. (The amendment is set out on page 10 of the record and as Appendix "B" of this brief.)

Purporting to be actuated by this amendment, on January 7, 1922, the claimant filed a motion, asking for a "rehearing" under the amendment and for "reconsideration" of the item of $9,500, excepting to the "disallowance" of that item. It does not

appear from the description of this motion in the answer that any contention was made therein that the Secretary had not taken jurisdiction of the item and had not considered it in the original proceeding.

A reconsideration was accorded. The subject matter of the claim was again considered, in this instance by the War Minerals Relief Commissioner (who, meanwhile, had succeeded the War Minerals Relief Commission), who on October 31, 1922, quoting the answer, "adhered to former rulings, held that money spent in the purchase of real estate or on a contract for the purchase of real estate is not repayable as a loss under the law, either as originally passed or in the amendatory form." He recommended disallowance. On November 21, 1922, the Secretary of the Interior, by his First Assistant, affirmed this decision.

The petition filed below asked mandamus on the theory that the Secretary of the Interior refused, on the ground that he was without authority under the law to consider these items, to take jurisdiction thereof and did not consider them.

The questions in the case are: (I) Did the Secretary refuse to take and exercise jurisdiction as to these items? (II) If he did not take and exercise jurisdiction, should he have done so under a proper construction of the act as amended? (III) Did the claimant by acceptance and acquiescence in the award waive any right to further question it?

ARGUMENT

I

The Secretary did not refuse to consider this claim. He exercised his jurisdiction and disallowed the claim. In that situation mandamus does not lie, unless he exercised his discretion in an arbitrary manner, which is not alleged here

That the Secretary's duty under the act is not ministerial only, but involves the exercise of discretion, is patent from the language of the act, is not questioned in the pleadings, nor in the opinion of the court below. The theory relied on is, not that mandamus lies to compel the performance of a merely ministerial duty nor that mandamus lies to correct an arbitrary abuse of discretion where there is discretion, but that mandamus lies to compel the exercise of jurisdiction even where the duty to be performed involves discretion. The theory is good. Whether it is applicable to this case depends on the answer to a question of fact. Did the Secretary as a matter of fact take jurisdiction of and consider these items and thereupon disallow them, or did he, in effect, dismiss them, refusing to consider them? Plaintiff in error says that he did exercise his jurisdiction and that therefore mandamus does not lie.

The demurrer admits the relevant facts pleaded in the answer, which have been set out above in the statement of the case. It appears from these facts that there were two separate and distinct stages of this proceeding before the Secretary. In the first, the claim was filed, considered by the War Minerals

Relief Commission, recommendations made thereon, those recommendations approved, an award made in full settlement of the claim, and the same paid and accepted. There remained nothing further for the Secretary to do. Either he had or had not, in this first stage of this proceeding, exercised jurisdiction over these items. Whether he had or had not exercised jurisdiction could not possibly be affected by anything he might thereafter do or say. Let us examine, therefore, the facts as stated in the answer which bear upon this first stage of the proceeding, keeping in mind the rule that upon demurrer doubts are to be resolved in favor of the pleader.

All that appears in the answer relative to the first stage of the proceeding is that a total claim for $55,204.15 was filed, that these two items were a part of it, that they were passed upon and disallowed by the Secretary (for the action of the War Minerals Relief Commission was his action when, as here, he approved it), that he found the net justifiable claim to be $23,047.36, and that that amount was paid in full settlement of the claim and so accepted. There is not another fact stated in the answer that has any bearing on this first stage of the proceeding unless it be the allegations in paragraphs 5 and 7 of the answer that the Secretary did take jurisdiction of the entire claim, including these items, and that he gave consideration to every item, "disallowing for cause deemed by him to be good such items as were not elements in fixing the amount that should be allowed

and awarded as just and equitable." There is no statement whatever in the answer as to the Secretary's reason upon the first stage of this proceeding for disallowing these items other than that he disallowed them "for cause deemed by him to be good."

To say that these facts show that the Secretary did *not* take jurisdiction of these items is to say that black is white.

We pass then to the second stage of the proceeding before the Secretary, although, it is our contention, unless the answer shows he did not assume jurisdiction in the first stage, it does not matter what was done upon the second stage.

The second stage of the proceeding began more than one and one-half years after the award in full settlement of the claim had been made and paid, and it began with a motion for a rehearing and reconsideration of the claim, excepting to the disallowance of the items here in question. (It may be pointed out that the character of this motion, asking for a "rehearing," a "reconsideration," and excepting to a "disallowance" by the Secretary, is hardly compatible with the theory now urged that the Secretary did not consider and pass upon these items.)

A reconsideration was accorded. The subject matter of the claim was again considered. The claim was once more disallowed and for the first time a specific reason is stated for the disallowance—"the War Minerals Relief Commissioner * * * held that money spent in the purchase of real estate

or on a contract for the purchase of real estate is not repayable as a loss under the law." It does not appear, however, that this was the sole ground for the Secretary's decision, even upon the rehearing, since the language of paragraph 6 of the answer applies as well to the second stage of the proceeding as to the first, that he disallowed the items "for cause deemed by him to be good."

How is it possible to say from these facts that the Secretary did not take jurisdiction of these items. He gave each of them consideration. Then he disallowed them for a cause deemed by him to be good and that cause included his decision that money spent in the purchase of real estate "is not repayable as a loss under the law."

Is the language just quoted equivalent to saying: "Here is a loss incurred in producing or preparing to produce manganese, but of this loss the law denies me jurisdiction, and therefore I will not consider it?" Such is the position defendant in error is compelled to take. On that his whole case hangs. But to interpret this language as defendant in error does is to distort it out of all semblance to its reasonable intent. Its true significance is plain. The War Minerals Relief Commissioner might have stated it thus: "The law authorizes me to pay losses incurred in producing or preparing to produce manganese. Under the law I can pay such losses and no other. Money spent in purchasing or contracting to purchase lands containing manganese is not, as a matter of fact, money spent in producing or pre-

paring to produce manganese. It is not therefore repayable under the law." But such a view destroys the argument that the Secretary did not take jurisdiction of the claim.

The cases (*Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638; *Secretary of the Interior* v. *Mosier*, 261 U. S. 352; *Work* v. *United States ex rel. McAlaster-Edwards Coal Co.*, 262 U. S. 200) cited by the court below as justifying mandamus here are easily distinguishable from this case.

In *Louisville Cement Company* v. *Interstate Commerce Commission* the court ruled that mandamus was proper to compel the Interstate Commerce Commission to take jurisdiction of a claim where the Commission had expressly held that the claim was barred from its consideration and where, therefore, it had dismissed the claim. But that is not this case. Indeed, the opinion in the case cited clearly distinguishes it from just such a case as this. Referring to the record of the Interstate Commerce Commission, the court said, l. c. 642:

> It is thus made very clear that the holding of the Commission was, *not that having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation*, but that the language of the two-year provision of the act was jurisdictional and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed. (Emphasis ours.)

In the present case there is nothing to suggest that the Secretary refused to consider this claim or that he dismissed it for want of jurisdiction. The particular item involved here was taken by the Secretary with the claim when it was filed, was considered with it and as a part of it, and was in the judgment or award when it was rendered, the award being of a named amount in "*full*" settlement of "*this claim*," that is, of the claim as filed (not of a part of the claim, the remainder having been dismissed).

In *Work* v. *Mosier* the court held that mandamus was proper to compel the Secretary of the Interior to perform a duty that was clearly ministerial only, involving no discretion whatsoever, although the Secretary erroneously claimed it was a discretionary duty. The act of Congress in question in that case made it the duty of the Secretary of the Interior to pay to the parents of minors among the Osage Indians pro rata shares in royalties from oil and mineral properties. As to the payment in the first instance of these royalties the act gave the Secretary no discretion. His duty was ministerial and mandamus was appropriate. *McAlaster-Edwards Coal Company* v. *Work* is exactly similar to the *Mosier* case and turns upon the holding that the duty enjoined on the Secretary of the Interior is purely ministerial. Both are patently distinguishable from a case where the duty devolving upon an officer is discretionary rather than ministerial.

In the opinion by the court below appears this language: "The question as to whether or not money paid for manganese land comes within the purview of the statute is a matter of statutory construction, not finally intrusted to the discretion of the Secretary, but determinable in court at the instance of the claimant." The *Mosier* and *McAlaster-Edwards Coal Company cases* are referred to. The court below, however, in announcing the doctrine quoted, overlooked the fundamental distinction between this case and the cases cited. It is true that where a ministerial duty is imposed by an act upon an officer the construction of the act is ultimately for the courts. One who is entitled to the benefit of the act may ask mandamus to compel performance of the duty. What the administrative officer may have said as to the construction of the act is in that case not binding on the courts. Such were the *Mosier* and the *McAlaster-Edwards Coal Company cases.* It is true also that even when the duty imposed involves discretion, an act governing the jurisdiction of the administrative officer, and which must be construed before he can proceed to act at all, is ultimately to be construed by the courts. Such was the case of *Louisville Cement Company* v. *Interstate Commerce Commission.* But it is not true that in the case of a duty involving the exercise of discretion, where statutory construction is necessary only to determine whether a given set of facts is within the benefit of the statute and not to determine whether the subject matter is within the jurisdiction of the officer, it is

not true that then the construction of the statute is ultimately for the courts. The construction of the officer is final, unless arbitrary and without any justification whatever. (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Ness* v. *Fisher*, 223 U. S. 683, 691; *Alaska Smokeless Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347.)

In *Ness* v. *Fisher*, 223 U. S. 683, 691, wherein it was contended that the Secretary of the Interior had wrongly construed a statute with the administration of which he was charged, the court, in an opinion by Mr. Justice Van Devanter, said:

> The Secretary's decision rejecting the relator's application was not arbitrary or capricious, but was based upon a construction of §2, which was at least a possible one, had long prevailed in the Land Department, had been approved in *United States* v. *Wood*, 70 Fed. Rep. 485, and *Hoover* v. *Salling*, 102 Fed. Rep. 716, and has since been sustained by the Court of Appeals in the present case. True, a different construction had been adopted in *Hoover* v. *Salling*, 110 Fed. Rep. 43, and has since been followed in *Robnett* v. *United States*, 169 Fed. Rep. 778; but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, and that to determine whether the relator's application conformed thereto necessarily involved the exercise of judgment and discretion.

So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur* v. *Paulding*, 14 Pet. 497, 515; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 230; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324. Original discussion being foreclosed by these cases, we will merely quote from two of them to illustrate the reasoning upon which they proceed. In the *Decatur case* it was held that mandamus could not be awarded to compel the head of one of the executive departments to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction, the court saying: "The duty required by the resolution was to be performed by him as the head of one of the executive departments of the Government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere

ministerial duties. The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. * * * If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. * * * The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended

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to be given to them." And in the *Riverside Oil Co. case*, where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his to the effect that a forest reserve lieu-land selection must be accompanied by an affidavit that the selected land was nonmineral in character and unoccupied, it was held that his judgment and discretion could not be thus controlled, it being said (p. 324): "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. * * * Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction. If this writ were granted, we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and

> which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."

In *Hall* v. *Payne*, 254 U. S. 343, 347, wherein it was contended that the Secretary of the Interior had wrongly construed a statute with the administration of which he was charged, the court, in an opinion by Mr. Justice McKenna, said:

> It is manifest from this statement that the petition presents a controversy over the true construction of the act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved "from any *adverse* appropriation" means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view. He could not administer or

> apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683.

There is no possible question here as to whether the Secretary had jurisdiction of the subject matter. He had exclusive jurisdiction of all claims for reimbursement of losses arising under the act. The only question he had to determine was whether an alleged loss was such a loss as the statute covered; that is, whether it was incurred "in producing or preparing to produce manganese." Of course, to do that he must determine what the words of the statute meant—and, in a sense, that is construction of the statute—but as to such construction his is the final word. At least mandamus does not lie to correct his error.

The distinction is the one pointed out by this court in the case of *Cement Company* v. *Interstate Commerce Commission, supra,* between what is "jurisdictional, a limit set to the power of the commission," and "a rule of law for the guidance of it in reaching its conclusion."

II

The Secretary's construction was right. The act does not authorize the repayment of a loss incurred in purchasing or upon a contract for the purchase of land

If, however, it be conceded *arguendo* that the Secretary did not take jurisdiction of this claim, there remains the question as to whether money paid as a part of the purchase price of land is money paid "by reason of producing or preparing to produce * * * manganese." If not, then the Secretary's construction is correct and mandamus does not lie. Let us consider then that question, keeping in mind that we are dealing with an act conferring a gratuity, based only on a moral obligation, and, therefore, to be construed strictly in favor of the United States. And, first, let us consider it as if the third proviso, including the words "for or upon property," were not contained within the section.

The Secretary is to pay such losses as have been suffered "by reason of producing or preparing to produce" manganese, etc. Obviously, buying land containing manganese is not "producing" manganese. Is it "preparing to produce" manganese?

The preferred meaning of the word "prepare," when used as a verb transitive, is "to fit, adapt, or qualify for a particular purpose, end, or condition; to put into a state for use or application" (Webster's New International), and, when used as a verb intransitive, is "to make ready, to put things in order." As a verb intransitive it also means "to make one's self ready, to get ready" (Webster's New International).

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"Preparing to produce" manganese then is fitting, adapting, or qualifying (something) for the production of manganese, putting (something) into a state for the production of manganese, as, e. g., sinking shafts, installing machinery, providing mining equipment and facilities for transportation. So construed, of course, "preparing" is a transitive verb and the sense is the same as if the language were "preparing *lands* to produce managnese." If that is the sense, acquisition of lands is not included. Acquiring title to lands is not doing something to, on, or in connection with lands to produce manganese therefrom. It is not possible that by the word "preparing" Congress intended, not such a preparation as is external and capable of being objectively admeasured by the Secretary of the Interior, but such a preparation as could be determined definitely to be such only by the individual claiming to have made the preparation. A student, taking a course in mining engineering, may be preparing thereby to produce manganese. A mining engineer engaging transportation to some distant point where manganese is reported to exist, may be preparing thereby to produce manganese. A speculator buying land in which there is said to be manganese and intending later to take steps to mine for it, may be preparing thereby to produce manganese. But these persons are preparing *themselves* (not property) to produce manganese; they are not doing anything objectively upon property to extract manganese therefrom. The act refers to preparation of the latter kind, which can be seen, valued, and clearly determined by the Secretary of

the Interior to have been preparation for the production of manganese.

Consider now the third proviso upon which the decision below seems to have been based and which provides—

> that no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of said Secretary, that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese in sufficient quantities to be of commercial importance.

Is the purpose of this proviso to enlarge the meaning of the section so as to include within the phrase, "preparing to produce manganese," expenditures which would not otherwise be included? The general rule is that the province of a proviso is to restrict, not to enlarge the meaning of the enacting clause (*United States* v. *Dickson*, 15 Peters, 141, 163; 36 Cyc. 1162). This proviso on its face (and so also of the other provisos in this section) *is* restrictive of the Secretary's power. It is not merely sufficient, says this proviso, that expenditures have been made in producing or preparing to produce manganese. The Secretary is restricted to a consideration of those expenditures that have been made *in good faith* and with reference to property *actually containing manganese in commercial quantities.* Would it not be strange if in the middle of a proviso whose apparent object is to restrict the number of claims the Secretary may

allow the Congress should have inserted a single word with the object thereby of *greatly increasing* the number of potential claims? It is said that the word "for" in the phrase "for or upon property" does exactly that thing, that by reason of "for" the Secretary must liquidate losses incurred in purchasing lands.

It must be conceded that if the language, "expenditures * * * for or upon property which contained * * * manganese" stood alone, if it is not considered in connection with the context of the whole section and its history, it might reasonably be construed to include money spent in the purchase of lands. Not so, however, when construed in the light of the whole section. When thus construed it appears that of the two definitions of the word "for" given by the lexicographers: (1st) "for,"—"on account of," "because or by means of" and (2d) "for,"—"that in consideration of which anything is done or takes place" (Webster's New International), the first is the sense in which the word is used here. That is to say, by "expenditures * * * for or upon property which contained * * * manganese" was meant, e. g., an expenditure for mining machinery actually installed "upon" the property or again, e. g., an expenditure for machinery not actually installed but intended "for" the property.

So construed this proviso is harmonious with the enacting clause. Construed otherwise it is inconsistent with the enacting clause. An expenditure

"for" property in the sense of "on account of" property may be an expenditure made "in preparing to produce manganese." An expenditure "for" property in the sense of "in consideration of" property could not be an expenditure made "in preparing to produce manganese."

Again, construed as we urge, this proviso is harmonious with the proviso immediately succeeding it, which restricts reimbursements to expenditures made between certain named dates "*in a legitimate attempt to produce * * * manganese.*" The steps taken in "preparing to produce" must be at least "an attempt to produce." Would it be said that a man who has bought a farm in the Corn Belt and has done no more has "attempted" to raise corn, even though he bought the farm with the intention of raising corn? Can it be said that one who has bought manganese land in Arkansas and has done no more, has "attempted" to produce manganese? "Attempt" is defined as a "putting forth of effort to effect or to do something" (Standard Dictionary). One has made an "attempt to produce" when he "has put forth an effort to produce." A direct connection must exist between the effort and the end aimed at. None does exist between the acquisition of land and the production of something out of or upon the land, so that the acquisition may be said to be a part of the production.

A owns a tract of land containing manganese. He does nothing. Will it be said that he has "attempted" to produce manganese, or has done anything in the way of "preparing to produce" manganese?

Certainly not. *B* acquires the tract from *A* by purchase or as a gift and he now stands in *A's* shoes. *B* now owns the tract, but he does nothing. Has he attempted to produce manganese? Certainly not. No more than *A*. What plan he has in mind or what plan *A* had in mind, makes no difference. "Attempt" involves an objective effort, not a mere intention. So, if the third proviso broadens the phrase "preparing to produce" to include expenditure for purchasing land, then it is inconsistent with the fourth proviso, which limits it to "legitimate *attempts*" to produce between certain dates.

Again, if the third proviso is construed in the manner sought by the claimant, it does not harmonize with the last proviso in the section. The last proviso requires the Secretary in determining losses to take into consideration and charge to the claimant "the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine." This language embraces everything that should be deducted and charged to the claimant if nothing was intended by Congress to be included in the claim except what was expended "for" (in the sense of "on account of") and "upon" the property. Obviously, however, it is very incomplete if in the claim could be included expenditures "for" (in the sense of "in consideration of") property. Why make provision for charging against the claimant

"the market" value of any ores or minerals on hand and not make provision for charging against him the market value of lands on hand. Why specifically provide for charging against the claimant the usable value of machinery remaining and make no provision for charging against the complainant the market value of lands remaining. There is only one satisfactory explanation. Congress did not intend the purchase price of lands to be included in the claim; hence, no reason existed for requiring that its market value be charged off in the final settlement.

Consideration of the last proviso in the section develops another argument against the construction urged by defendant in error for the third proviso. It is clear from the language of the last proviso—it would be equally clear from the language of the section proper—that expenditures for machinery, "purchased to equip said mine," may be included in the claim. The machinery may not actually have reached the mine, or it may have been intended for use in connection with the mine, but not actually "upon" the property. Is it possible that by proviso three it was the intention of Congress to exclude what the last proviso includes? It does unless "for" in proviso three means "on account of," since only the word "for" in proviso three possibly could include such machinery or appliances. The court below suggests that the word "for" as used in proviso three might be given the meaning, "on account of," so as to exclude nothing that should

clearly be included, and also the meaning, "in consideration of," so as not to exclude the purchase price of land, but this observation of the court below was evidently made without careful consideration. That the word "for" was used here in two wholly unrelated senses at the same time is, of course, untenable.

Upon this phase of the case our conclusion is that the only construction that renders the whole section harmonious—and that is the construction which should if possible be adopted (*United States* v. *Landram*, 118 U. S. 81, 85; *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*, 235 U. S. 327, 337; *Market Co.* v. *Hoffman*, 101 U. S. 112, 116)—is the one which the Secretary followed. Moreover, that construction fits with what we know of the legislative history of the act.

The history of the War Minerals Relief Act is thus epitomized in Senate Document No. 385 (66th Cong., 3d sess., p. 43) (see also Congressional Record, 65th Congress, 3d session, Volume 57, Part 3, p. 2212):

> The war minerals relief act was first introduced in the Senate as an amendment to H. R. 13274, Sixty-fifth Congress. It originally read:
>
> "That the Secretary of the Interior be, and hereby is, authorized and directed to ascertain and determine the amount or amounts of money heretofore invested or contracted to be invested and obligations incurred by any and all persons and investors for producing or for the purpose of producing or preparing for

producing or *acquiring property for producing* * * *."

During its consideration an objection was made by a Senator:

"I want to call the attention of the Senator from Nevada to the words 'or acquiring property for producing.' It seems to me that is going too far. I think that where a man has purchased a piece of property for producing these metals, we should not authorize the Secretary of the Treasury to go into the question as to what he paid and whether he lost upon the purchase price of that property because of the fact that the war closed sooner than he anticipated. I believe that is going altogether too far. I will ask the Senator if it would not be very much better to strike out the words 'or acquiring property for producing' "?

The chairman of the Senate Committee on Mines and Mining, in charge of the legislation, answered, "I will consent to that, Mr. President."

The law as finally enacted was drafted by the House Committee on Mines and Mining and does not contain the phrase "or acquiring property for producing."

EFFECT OF THE AMENDMENT

The amendment of November 23, 1921, has no effect whatever in this case. A comparison of the act as amended with the original act shows that the only change made by the amendment was either to clarify or amplify the meaning of the language in the

original act requiring that production or preparation to produce manganese must have been in compliance with the request or demand of the Department of the Interior, etc. The amendment says, it must have been "in response to any personal, written, or published request, demand, solicitation, or appeal from any of the Government agencies mentioned in said act." The answer filed in the case gives the reason for the amendment. It was to overcome the effect of a ruling of the Attorney General restricting the benefits of the act to those who had been specifically solicited. The amendment contains no language in any way enlarging or suggesting an enlargement of what might be included in a claim arising from producing or preparing to produce manganese. (That the sole purpose of the amendment was that here indicated is clear from the history of the amendment set out in Appendix "C").

III

In any event, defendant in error, having accepted payment of his claim "in full settlement" thereof, is estopped from further prosecution of the claim or any part of it

If we are in error in everything we have so far said, still the defendant in error is not entitled to mandamus in this case. He is estopped by his acceptance of and acquiescence in the award made.

He did accept the award. His acceptance was either unconditional or conditional. The record shows, first, an unconditional acceptance, and, thereafter, by counsel, another or second acceptance to

which a condition was attached. But what was that condition? It is to be noted that it was not that the claimant did not waive any right to reimbursement of losses not considered by the Secretary or that he did not waive any right to reimbursement for the particular item of $9,500, but that he did not "waive any right to further award under any additional remedial legislation which may be passed and which might permit further payment." Ignoring then the unconditional acceptance and considering only the conditional acceptance, certainly it must be granted that under it the claimant estopped himself from thereafter seeking relief of any kind under the original act. He saved only such rights as might be conferred by future legislation.

Thereafter the amendment was adopted and only then did the claimant file a motion for a rehearing, obviously that he might have the advantage, if any, of such right to further award as the amendment gave him. So doing, he was acting within the condition he had attached to his acceptance. Was that a withdrawal or further qualification of the acceptance? Obviously not. But if the motion for a rehearing under the condition of the acceptance was not a withdrawal of the acceptance, then the action of the Secretary in giving consideration to the motion (that is, in considering whether the amendment did give the claimant any further right) was not a waiver of the estoppel which arose from the acceptance. The estoppel still stands in the

claimant's way and he can not have mandamus unless the amendment entitled him to relief not due him under the original act. We have seen already, however, that the amendment made no change whatever in the situation as to this claim or any of the items thereof.

It will not do to say, as the court below says in its opinion, that "the acceptance of the amount awarded to the relator did not bar him from relief with respect to the $9,600 item." His acceptance was not merely of the "amount awarded." He accepted the "award and recommendation" of the War Minerals Relief Commission, which was that he be paid $23,047.36 "in full settlement of his claim." That included, of course, the two items making up the $9,600. Nor will it do to say, as the court below says in its opinion, that the Secretary waived the bar by granting the rehearing. A fair construction of the record is that the rehearing went only to that for which only it was asked, namely, to determine whether the claimant had any new rights under the amendment. In order to consider and determine that question, there was no reason for waiving any bar. It was not necessary to waive any bar. There is no justification, therefore, for concluding that any bar was waived. And, if not waived, it stands as a complete estoppel. The defendant in error cannot ask mandamus to compel additional payments on a claim of which "full settlement," by his own acknowledgment, has been made already.

CONCLUSION

It is respectfully submitted that mandamus does not lie here for the reason that the Secretary did take jurisdiction of this claim and did exercise his discretion with respect to it. It is submitted, also, that the Secretary's construction of the act, that it did not include expenditures for the purchase of lands, was the correct construction. Finally, it is submitted that, in any event, the defendant in error is estopped by his unqualified and unconditional acceptance of what was allowed him in "full settlement." The decision of the Court of Appeals should be reversed.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.

NOVEMBER, 1924.

APPENDIX "A"

Section 5 of the Act of Congress entitled "An Act to Provide Relief in Cases of Contracts Connected with the Prosecution of the War and for Other Purposes," approved March 2, 1919.

> SECTION 5.—That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce either manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war; said minerals being enumerated in the Act of Congress approved October fifth, nineteen hundred and eighteen, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported or of which there is or may be an inadequate supply."
>
> The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the

decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence expenses, supplies, postage, printing, and all other expenses incident to the proper prosecution of this work, both in the District of Columbia and elsewhere, as the Secretary of the Interior may deem essential and proper, shall be paid from the funds appropriated by the said Act of October fifth, ninteen hundred and eighteen, and that said funds and appropriations shall continue to be available for said purpose until such time as the said Secretary shall have fully exercised the authority herein granted and performed and completed the duties hereby provided and imposed: *Provided, however,* That the payments and disbursements made under the provisions of this section for and in connection with the payments and settlements of the claims herein described, and the said expenses of administration shall in no event exceed the sum of $8,500,000: *And provided further,* That said Secretary shall consider, approve, and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act; *And provided further,* That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon

property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance: *And provided further*, That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April sixth, nineteen hundred and seventeen, and prior to November twelfth, nineteen hundred and eighteen, in a legitimate attempt to produce either manganese, chrome, pyrites, or tungsten for the needs of the Nation for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claims and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary: *And provided further*, That the settlement of any claim arising under the provisions of this section shall not bar the United States Government, through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right to recover any money paid by the Government to any party under and by virtue of the provisions of this section, if the Government has been defrauded, and the right of recovery in all such cases shall extend to the executors, administrators, heirs, and assigns of any party.

That a report of all operations under this section, including receipts and disbursements, shall be made to Congress on or before the first Monday in December of each year.

That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States: *Provided further,* That in determining the net losses of any claimant the Secretary of the Interior shall, among other things, take into consideration and charge to the claimant the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid.

APPENDIX "B"

Amendment of November 23, 1921:

Provided, That all claimants who, in response to any personal, written, or published request, demand, solicitation, or appeal from any of the Government agencies mentioned in said act, in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said act, if the proof in support of said claims clearly shows them to be based upon action taken in response to such request, demand, solicitation, or appeal, shall be reimbursed such net losses as they may have incurred and are in justice and

equity entitled to from the appropriation in said act.

If in claims passed upon under said act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts.

Appendix "C"

The Amendment of November 23, 1921, set out herein as Appendix B, was introduced in the Senate in the 66th Congress as Senate Bill 843. It is dealt with in Report No. 325, House of Representatives, 67th Congress, 1st Session, entitled "Contracts connected with the prosecution of the war." Following the text of the Bill and an excerpt from section 5 of the original Act which it was designed to amend, the Committee reported:

> The amount appropriated, under the war minerals relief act of March 2, 1919, for the relief of claimants, was $8,500,000. There were filed within the time fixed by the act 1,208 claims, of which 610 claims were rejected by the Secretary of the Interior upon the ground that claimants failed to show a direct and personal "request or demand" either by the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to produce or preparing to produce either manganese, chrome, pyrites, or tungsten.

In addition to the rejection of the 610 claims, 50 additional claims, aggregating $178,891.67, were rejected upon the ground that said claims did not reach the office of the Secretary of the Interior by 12 o'clock, noon, June 2, 1919.

In the administration of the law, in a very few cases, it was discovered that mathematical errors were made against claimants. Under a ruling by the comptroller, the Secretary of the Interior is without authority to make amended awards.

With the approval of the Secretary of the Interior, your committee unanimously recommends the passage of the bill as amended, so as to permit the correction of errors through miscalculation, and the consideration of the claims deposited in the United States mails prior to 12 o'clock noon on the 2d day of June, A. D. 1919.

The evident purpose of the bill as passed by the Senate was to permit a more liberal construction of the "request or demand" provision of the law by the Secretary of the Interior in the consideration of claims filed under section 5 of the said war minerals relief act.

No additional appropriation is necessary, and none asked for by the proposed act.

A letter from the Secretary of the Interior, addressed to the chairman of the committee, June 27, 1921, covers completely every point involved in the proposed amendments to the Senate bill, and the same is herewith respectfully submitted.

The letter of the Secretary of the Interior referred to in the report was as follows:

THE SECRETARY OF THE INTERIOR,
Washington, June 27, 1921.

MY DEAR MR. CHAIRMAN: Senate bill 843 merely amends the act of March 2, 1919, relative to war minerals relief in relation to the character of request or demand; that is to say, stimulation. It broadens the scope of stimulation along the line which, I may say, I should have followed had I passed upon the cases already decided as an original proposition.

In reviewing these cases I have power, in my judgment, to reach the end provided in this bill without additional legislative authority.

However, much more serious questions are presented in the consideration which is now being given by way of review of some of these cases and original examination of others.

It appears that the commission passing upon these cases submitted to the comptroller and had a ruling from him upon the question of time limit in the matter of presentation of cases. The rule was adopted that although a case might have been mailed prior to the expiration of the time limit, unless it had reached the hands of the commission itself prior to 12 o'clock it should not be considered, and no such cases were in fact considered.

I am unofficially informed that a messenger was watching for mail, and at exactly 12 o'clock the mail which had arrived was taken

out, and that no cases arriving through the mails or otherwise at any time thereafter were considered.

Second. Cases which were considered and upon which a decision was reached allotting or allowing a certain amount to be paid were later reopened or reconsidered and an additional amount allowed, it being shown that an error had been made by the commission itself, and not through any fault of the claimant, in arriving at the original sum. The comptroller declined to pay the additional sum.

Should the pending measure (S. 843) be adopted, or, even without the authority contained therein being granted, should the Secretary find upon review that additional amounts were due to some of those who have already had their claims passed upon by the commission, such conclusion being reached either upon authority of legislation or under the present incumbent's interpretation of the law as it exists, the comptroller, under his prior rulings, would decline to pay such amounts so found to be due.

It will thus be seen that should the comptroller adhere to his rulings, while the Secretary of the Interior might, in so far as his authority extends, grant relief or additional relief in reviewing cases, or in original consideration of those yet pending, and such action of the Secretary be (as it would be) contrary to the rulings of the comptroller, no recourse would be left except an appeal to Congress for leave to file claims before a court of claims or some other tribunal.

I had hoped that no legislation whatsoever would be necessary, and in my conception of the law none would be necessary; but it is impossible, of course, for the Secretary of the Interior to control the judgment or action of the comptroller. Congress can do so, and it also can afford relief.

I therefore consider it my duty to suggest to you that S. 843 be passed with an amendment to the effect that claims filed or mailed at any time prior to the expiration of the time limit fixed in the congressional act may be considered as if same had reached the particular office of the claims commission in the city of Washington at the time when the claims which were considered by the commission did so reach their office. Of course, I am not suggesting to you the words of this amendment.

That the bill should also be amended to provide that should a review of the cases already decided develop the fact that by mistake in calculation, or by a strict ruling of the commission contrary to the proposed provisions of S. 843, as to the matter of stimulation, that amounts or additional amounts so found due should be approved for payment by the comptroller.

Very sincerely yours,

ALBERT B. FALL.

Hon. MARION E. RHODES,
Chairman House Committee on Mines and Mining, Washington.

That the sole purpose of the amendment was as indicated in our brief is clear from this history.

O

INDEX

STATUTES

(Continued)

CASES

IN THE

Supreme Court of the United States

October Term 1923

No. 272

HUBERT WORK, SECRETARY OF THE INTERIOR,
Plaintiff in Error

v.

UNITED STATES OF AMERICA, EX REL LOGAN RIVES,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

The defendant in error, Logan Rives, was solicited in June, 1918, by two representatives of the Department of the Interior to produce manganese for the Government in the prosecution of the war, (R. p. 6.)

In July, 1918, subsequent to and at the request of the Government representatives, he contracted to purchase two tracts of land near Batesville, Arkansas, paying $100.00 for the option and thereafter $9,500 as an initial payment, but after the signing of the armistice he elected "to forfeit his payment and did not complete purchase" (R. p. 6), there being still due $11,000 for the property then worth only the sum of $1,000. (R. p. 2.)

Congress, by the act of March 3, 1919, (40 Stat. 1272, Comp. Stat. 3116, 14/15a, Federal Stat. Anno. Sup. 1919, p. 304), (R. p. 4), authorized the Secretary of the Interior to adjust and pay the net losses suffered by any person by reason of producing or preparing to produce manganese in compliance with the request of the Department of Interior, among other Government agencies, to supply the urgent needs of the Nation in the prosecution of the war. There are several provisos in the act modifying the authorization to pay such net losses which will be later considered in detail, the third proviso being in effect that no claim should be allowed or paid by the Secretary unless the claimant could satisfy him that the expenditures made "were made in good faith for or upon property which contained manganese, * * * in sufficient quantities to be of commercial importance." The claimant seasonably filed under this act with the Department of the Interior a claim for the payment of the net losses suffered by him in producing or preparing to produce manganese, and by the findings of the Secretary (R. pp. 5-8) was held to have come within the requirement of the statute as to Government request, his good faith, the commercial importance of the property, and the legitimate attempt to produce manganese for the needs of the Government.

With the claim, however, was asserted the claim for the $9,600 spent in contracts for purchasing the property, and which was a total loss. (R. p. 6.)

The War Minerals Relief Commission organized by the Secretary of the Interior to carry out the provi- claim this amount paid on the purchase of land and sions of this law "deducted" from the amount of the recommended an award of $23,047.36 to be made in settlement of the rest of the claim. (R. p. 6.) This amount was awarded by the Acting Secretary of the Interior. (R. p. 7.) On November 23, 1921, Congress passed an amendatory act (42 Stat. 322), (R. p. 10).

Thereafter, on January 9, 1922, the claimant filed a motion for rehearing the Secretary's refusal to consider claimant's net losses suffered by reason of his contract to purchase this property. The Assistant Commissioner of the War Minerals Relief Commission on October 31, 1922, recommended that this claim be disallowed because "the item involved is clearly an expenditure incident to the purchase of property and therefore is not payable under the law." (R. p. 8.) On November 21, 1922, this recommendation was affirmed by the First Assistant Secretary of the Interior who said that the proposition that the expenditures for property was within the purview of the law "has been repeatedly urged before the Department and it has uniformly been held that the law does not contemplate reimbursement for expenditures of this nature." R. p. 8.)

Thereupon the claimant filed a petition in the Supreme Court of the District of Columbia (R. p. 1) praying a mandamus directing the Secretary of the Interior, to take jurisdiction of the claim for net losses in the contract to purchase this property, to hear proof thereon, to allow such sum as may be

just and equitable to adjust and pay such net losses, if any, thus arising, and to ascertain the amount thereof. Rule to show cause was issued (R. p. 8). An answer was filed (R. pp. 5-11) in which the Secretary denied that he had failed to take jurisdiction of the claim and asserted that he had taken jurisdiction thereof; admits that he found the claimant suffered net losses in preparing to produce manganese in response to a request by the Interior Department; that the expenditures allowed were made in good faith; that the claimant was allowed such items as came "within the scope of the act," and averred that any further allowance would constitute a judgment against the United States.

The relator demurred to the answer (R. p. 11) on the ground that the Secretary's ruling that the claimant's net losses were not repayable under the law amounted to a refusal to take jurisdiction of his claim, or to exercise any discretion therein, and was a nullification of the plain intention of Congress.

The Supreme Court of the District of Columbia sustained the demurrer and ordered that a writ of mandamus be issued directed to the respondent commanding him to take jurisdiction of the relator's claim under the said act of March 3, 1919, for net losses arising from his contract to purchase, at the request of the Government, and in good faith, property containing manganese in sufficient quantities to be of commercial importance; to consider, under the court's construction of respondent's authority under the statute, relator's expenditures upon his contract to purchase said property; to hear proof thereon; and to allow such sum as may be just and equitable to liquidate and pay such net losses, if any, thus arising. (R. pp. 12-13.)

From this order a writ of error was sued out to the Court of Appeals of the District of Columbia, and the Court of Appeals affirmed the judgment of the court below (R. p. 15; 295 Fed. 225). A writ of error brings the case before this court.

The Chief Justice of the Court of Appeals of the District of Columbia, speaking for the court, stated the case as follows (R. p. 15):

> "By Section 5 just mentioned, before it was amended, the Secretary was authorized 'to adjust, liquidate and pay such net losses as have been suffered by any person * * * by reason of producing or preparing to produce * * * manganese * * * in compliance with the request or demand of the Department of the Interior * * * to supply the urgent needs of the Nation in the prosecution of the war;' and to 'make such adjustments and payments in each case as he shall determine to be just and equitable.' It is further provided that no claim shall be allowed or paid 'unless it shall appear to the satisfaction of the * * * Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese * * * in sufficient quantities to be of commercial importance.' And his decision is made 'conclusive and final' by the Act.
>
> "The relator stated that during the months of June and July, 1918, in preparing to produce manganese in compliance with the request of the Department of the Interior to supply the urgent needs of the Nation in the prosecution of the War, he agreed to buy two tracts of land situated near

Batesville, Arkansas, containing manganese in sufficient quantities to be of commercial importance, and made initial payment on the purchase of $9,600; that upon the signing of the armistice there was due by the petitioner on the purchase price of the land the sum of $11,000, but since there was then no further demand for manganese, the land was not worth to exceed $1,000; that to save himself further loss he elected under his contract of purchase to lose as liquidated damages the sum which he had paid on the purchase, namely, $9,600, and that this sum was a net loss to him. He filed with the Secretary, under the act just mentioned, a claim embodying several items which aggregated $55,204.15. Among them was the $9,600 item. The Secretary allowed a number of the items but rejected the one for $9,600. In accepting the award and requesting payment thereof the relator stated that he did not waive any right to further award under any additional remedial legislation which might be passed, and which might permit further payment. Payment for the allowed items was made to the relator.

"After this Congress amended the Act by adding thereunto the following:

"That all claimants who, in response to any personal, written, or published request, demand, solicitation or appeal from any of the Government agencies mentioned in said Act, in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said Act, if the proof in support of said claim clearly shows them to be

based upon action taken in response to such request, demand, solicitation or appeal, shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said Act. If in claims passed upon under said Act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculations, the Secretary of the Interior may award proper amounts or additional amounts.

"Subsequent to the passage of this amendment relator asked for a hearing with respect to the $9,600 item and other items. The rehearing was granted, and the Secretary went into the whole matter anew. He held against the relator on the ground that the money spent in the purchase of the real estate was not repayable as a loss under the law either as originally passed or in the amendatory form. With respect to these facts there is no dispute between the parties."

There is no specification of errors in the brief for plaintiff in error as required by Rule 21, 2 (2), but the assignment of errors (R. p. 13) presents the following propositions:

1. That losses suffered by the defendant in error, by reason of his contract to purchase property containing manganese in sufficient quantities to be of commercial importance, are not repayable under the Act of March 2, 1919, as amended.

2. That the action of the Secretary in refusing to adjust and pay this claim is not reviewable by mandamus.

3. That the defendant in error is barred from

having his claim considered by the Secretary by reason of his acceptance of the amounts paid for other losses.

4. That this is a suit against the United States.

In the brief for the plaintiff in error, however, the position that this is a suit against the United States is abandoned, and the following propositions are relied upon:

1. The Secretary considered the claim, and therefore mandamus will not lie unless his action was arbitrary.

2. The Secretary's determination that losses incurred by reason of a contract to purchase manganese lands were not repayable under the law is correct; and

3. Acceptance of the amount paid for the other items of the claim estops the claimant from making further claim.

We shall consider these propositions in the argument.

ARGUMENT

I

DEFENDANT IN ERROR'S NET LOSSES SUFFERED BY REASON OF HIS CONTRACT TO PURCHASE PROPERTY CONTAINING MANGANESE IN SUFFICIENT QUANTITIES TO BE OF COMMERCIAL IMPORTANCE ARE REPAYABLE UNDER THE SAID ACT OF MARCH 2, 1919.

1. The Act Considered From Its Four Corners.

On this proposition the Court of Appeals pertinently said (R. p. 16):

> "The statute authorized the Secretary to pay such net losses as were suffered by any person by reason of producing or preparing to produce manganese, etc. In purchasing this land the relator was preparing to produce manganese. This is admitted. The statute further says that no claim shall be allowed unless it shall appear that the expenditures made by the claimant 'were made in good faith for or upon property which contained * * * manganese,' etc. It is said that money paid in acquiring property for that purpose was not paid 'for' property within the meaning of the statute. The controversy seemed to turn upon the meaning of the word 'for.' In his opinion rejecting the claim the Secretary said that to adopt the view 'that the word "for" means for the purchase of property' would exclude other claims that should be allowed. We do not think this would follow because the word 'for' has many significations according to the lexicographers. In one relation it may mean, as the Secretary says, 'for the benefit or' or 'for the use of,' and in another 'in consideration of.' Webster says that in the most general sense it indicates 'that in consideration of which * * * anything is done or takes place.' The expenditure of the $9,600 was in consideration of the property—therefore was made 'for' it. It is a very common thing to say that so much money was paid for this or for that, meaning thereby that it was the consideration passed for

> the thing mentioned. We are satisfied that under the statute it was the intention of Congress to allow for losses incurred by reason of money paid for property which contained manganese."

The reasoning of the court below is clear and cogent and so far as the main question in the case is concerned, that is, the proper construction of the act under consideration, shows that there is no room for dispute. Indeed, it is idle to assert that in arriving at claimant's losses, the authorization to the Secretary to consider "expenditures for property" does not authorize him to consider money paid for the purchase or lease of property. This common sense construction has been given to the act by a formal opinion of the Acting Attorney General, promulgated on January 29, 1924, three days after this writ of error was sued out (R. p. 21), in passing upon the legality of the claim of the Anaconda Copper Mining Company for losses sustained in producing and preparing to produce ferro-manganese at Great Falls, Montana. The Acting Attorney General, in this opinion, points out that ferro-manganese is obtained by manufacturing operations and not by mining, and in deciding whether or not this product came within the provisions of Section 5 of the said Act of March 2, 1919, it became necessary to determine what was embraced within this act. As to this he said (p. 9 of the opinion):

> "The following extract from Section 5 of the Act of March 2, 1919, clearly provides:
>
> "That no claim shall be allowed or paid by said Secretary, unless it shall appear to the satisfaction of the said Secretary that the ex-

penditures so made, or obligations so incurred by the claimant were made in good faith, *for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of* commercial importance."

which provision makes it clear that Congress intended to provide relief only for those who had gone to the expense of purchasing property (mines) which contained manganese, chrome, pyrites, or tungsten, or for persons who had gone to the expense of installing machinery and so forth, on such property for the operation of such mines. The relief is clearly for expenses incurred in mining projects and not for expenses incurred in manufacturing projects. A plant, or smelter, for the production of 'ferro-manganese,' is not regarded as part of the equipment of a mine."

The contention of the plaintiff-in-error in this case, therefore, is in direct conflict with the formal opinion of the Acting Attorney General on the same subject, an opinion arrived at independently of the decision of the court below in this case. This opinion gives the spontaneous, natural and commonsense construction of the act under consideration.

Despite this clear opinion of the Attorney General, the Solicitor General now insists that one who at the request of the Government goes into the market and buys property containing manganese in commercial quantities, and then proceeds to produce manganese for the government, was not preparing to produce this mineral when he purchased the land for that purpose. The first step in the preparation to produce this min-

eral to be taken by one who did not own this character of mineral land was to acquire such land. It is unnecessary to reply to this argument. As said by the Court below, "In purchasing this land the relator was preparing to produce manganese. This is admitted." (R. 16.)

In the enabling clause of the act the Secretary is authorized to pay "net losses" suffered by any person in producing or preparing to produce one of the specified minerals for the use of the government. The War Minerals Relief Commission found that the relator forfeited the $9,500 payment and the land (R. p. 6.). This is an expenditure in producing and preparing to produce manganese, which the Secretary is authorized to consider, and a net loss he is authorized to pay, unless this authorization is limited by some of the provisos of the statute. The Solicitor General admits that if the third proviso requiring the claimant to satisfy the Secretary "that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese in sufficient quantities to be of commercial importance" stood alone, "it might reasonably be construed to include money spent in the purchase of land." (Brief for Plaintiff in Error, p. 22). We agree that the office of this proviso is to limit the enabling clause which authorizes the payment of net losses in producing or preparing to produce manganese, in that in arriving at these net losses, the Secretary is to consider money paid for the property itself, or in the development thereof, only in event (1) the property contained manganese in commercial quantities, and (2) the money expended for the property, or in the development, was expended in good faith and not for speculative purposes. This language is so clear as not to

need construction, and the Secretary has affirmatively found that the claimant has met both conditions—that the $9,600 was expended for a contract to purchase land containing manganese in commercial quantities, and that his expenditures were made in good faith and not for speculative purposes.

There is no authority in the statute for limiting the reimbursement of claimants to their operating losses alone, and such a construction is a wresting of the language from its plain meaning. If Congress had intended to draw a distinction between operating losses and other losses, it would have said so. If a distinction had been intended to be drawn between expenditures for the property and expenditures in developing it, appropriate language would have been used to that end.

There is no reason founded in common sense why Congress should reimburse a claimant who owned a mine before the beginning of the war period and in developing it at the request of the Government lost money, and should refuse to pay a claimant who in a legitimate attempt to produce the minerals, at the urgent request of the Government subsequent to the beginning of the war period, contracted to buy, bought or leased a mine and thus lost money.

To one who did not own land containing one of these minerals in commercial quantities April 6, 1917, and was requested by the Government to produce such minerals, the purchase or lease of such land was the first step to comply with the request of the Government and in the preparation to produce the minerals, and is the first prerequisite for relief under this act. The loss sustained in acquiring this ownership, lease, or interest, is just as legitimate as a loss occurring in any other stage of the production or preparation to

produce. Claimant may have been bankrupted by the loss of the money he paid for a lease or on a contract of purchase, just as certainly as by the loss of his expenditures in developing property already owned.

An examination of the modifications of the fourth proviso again disclose that Congress drew no distinction in limiting the payment of claimant's net losses between those arising in *investments* in acquiring property and those *obligations incurred* in developing the same. The effect of the first limitation in the fourth proviso is to inhibit the payment of net losses unless (a) the claimant could show that his "moneys were invested or obligations incurred subsequent to April 6, 1917, and prior to November 12, 1918, in a legitimate attempt to produce" one of the named minerals. If Congress had intended to limit these *investments* only to the buying, during the war period, of machinery, equipment and like expenses, and not to the acquiring of the necessary mine to produce the mineral, it could easily have said so.

The second limitation in the fourth proviso is (b) "that no profit shall be allowed * * * and no *investment* for merely speculative purposes shall be recognized in any manner." It is hard to conceive why Congress should have used this language unless it had in mind that many claimants had purchased lands containing one or more of these minerals in commercial quantities and it desired to safeguard the Government in not paying net losses thus occurring, if the claimant invested in such land for speculative purposes and not in a legitimate attempt to produce one of the named minerals for the Government for use in the prosecution of the war.

The Solicitor General insists that the language of the last proviso of the statute conflicts with the construc-

tion which the Court below puts upon the act.

The language of the proviso is as follows:

> "Provided further, That in determining the net losses of any claimant the Secretary of the Interior shall, *among other things,* take into consideration and charge to the claimant the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid." (Italics ours.)

In quoting from this proviso, the brief for the Secretary omits the very pertinent language, "among other things."

This proviso was written for the benefit of the Government and it is hardly to be expected that the Secretary would endeavor to limit it as suggested by the brief for him. A claimant might have the hardihood to suggest that the offsets which might be charged against the claim were limited to the market value of ore and the salvage value of the machinery on hand, but certainly the Secretary would not overlook the direction to include "other things" in his offsets. Congress assumed that there might be some question about offsetting the ore and machinery on hand, and therefore specially directed that they be included, but the market value of any lease or contract for purchase of mineral lands was equally assumed to be clearly "among other things" to be considered. At any event, the Solicitor General evidently overlooked the very

pertinent language "among other things," or he would not have submitted the argument on this proviso.

We insist that the language of the statute which authorizes the payment of the net losses suffered by any claimant by reason of producing or preparing to produce manganese for the urgent need of the Nation, is clear and unambiguous and cannot be limited or extended by executive construction, *Stockley v. U. S.*, 260 U. S. 532, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346; that "net losses" in preparing to produce manganese cannot by executive construction be limited to net operating losses alone; that the "expenditures (or money paid) for property containing manganese in sufficient quantities to be of commercial importance" which the Secretary is authorized to consider, cannot be limited or changed to expenditures made off of the property, but such authorization must be construed in the usual and ordinary meaning of the language employed as authorizing payment for net losses by reason of the lease, contract to purchase, purchase or otherwise acquiring such mineral lands.

It is respectfully submitted that from the four corners of the act it appears that the Secretary's refusal to consider losses arising from contracts to purchase these lands in producing and preparing to produce manganese is not only erroneous but arbitrary.

2. Legislative History.

The Court below very clearly disposed of the contention that the legislative history supported the Secretary's construction in the following language (R. p. 17):

> Much significance is given to what took place on the floor of the Senate when the bill was being con-

sidered, and it is said that because of this the word "for" must be given the restricted meaning attributed to it by the Secretary. But how are we to know whether the same view was taken by the House of Representatives when the bill was before that body? Anyhow it is immaterial. While reference may be made to reports of committees of either house, and even to debates in Congress, for the purpose of aiding in the interpretation of an ambiguous measure (United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310, 318, 38 Sup. Ct. 525, 62 L. Ed. 1130, and Wisconsin R. R. Commission v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, 589, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086), there is no authority for consulting those sources of information, where, as here, there is no ambiguity. See authorities just cited. In this case the effect of going to the proceedings of Congress would be to create a doubt where none existed before, and this is not allowable. Wisconsin R. R. Commission v. Chicago, B. & Q. R. R. Co., Supra, p. 589 (42 Sup. Ct. 232).

The discussion between Senators Henderson and Smoot is not admissible to throw doubt on the otherwise plain meaning of the language of the statute and we insist that a resort to legislative history is unnecessary. However, if we resort to the entire legislative history of this act it will be shown that the discussion between Senators Henderson and Smoot had no effect upon the ultimate law as adopted. The Minerals Relief Section was originally introduced by Senator Henderson as part of the Senate amendment to the bill, passed by the House, known as the Dent Bill (H.

R. 13274) authorizing the Secretary of War to consider and settle informal contracts. As originally introduced on January 20, 1919, (Cong. Rec. 65 Cong. 3rd Sess., p. 2310), it was offered as a new Section 7. Mr. Smoot objected to the language "for acquiring property" (p. 2311) and Senator Henderson consented that this should go out. The bill passed the Senate as amended but is not printed in the record as it was sent to conference. The conferees failed to agree and several times reported their disagreement to the House. On February 11, 1919, (p. 3316), the conferees submitted to the House a report in which the War Minerals Section is reported as Section 5 (p. 3317), a pertinent part of which follows:

> "Sec. 5: That the Secretary of the Interior be, and is hereby authorized to adjust, pay or discharge any agreement, express or implied, upon a fair and equitable basis, the amount or amounts of money heretofore invested, or contracted to be invested, and obligations incurred in good faith by any person * * * for producing or in good faith acquiring property for producing within the United States * * *."

The act provided further for payment of

> "all the amounts of such losses and damages as he, the said Secretary, shall find and determine to have been sustained by reason of having made such investments for said purposes."

This bill as agreed on in conference, it is seen, did not limit payment to claimants' net losses. It provided that the Secretary should "adjust, pay or discharge

any agreement, express or implied, upon a fair and equitable basis" the amount or amounts of money invested in good faith by any person "for producing or in good faith acquiring property for producing within the United States" one or more of the named minerals. It further authorized the payment "of such losses and damages" as the Secretary might determine to be just and equitable.

The House disagreed to this conference report and many objections were urged. But no objection was suggested to the authorization to pay losses arising from "in good faith acquiring property for producing" these minerals. The committee on Mines and Mining considered this amendment and on February 28, 1919, (p. 4259), through Mr. Foster speaking for the committee, moved to instruct the managers on the part of the House to agree to the Senate amendment with Section 5 as now in the law as an amendment. This committee considered this amendment "section by section and paragraph by paragraph" and redrafted it (Mr. Foster's statement, pp. 4261, 4262). Mr. Foster and other committee members undertook to justify to the House a bill reimbursing the losses of war mineral claimants, and the bill as agreed on in committee, and called particular attention to the safeguards thrown around the authorization to the Secretary to pay claimants' losses. Among other things, it is pointed out that the committee bill limited payments to *net losses* and to those who produced or prepared to produce at the request of the Government. The third and fourth provisos of the act were stressed as prohibiting payments for "holes in the ground" and speculative ventures of any kind, and as requiring that the property for or upon which expenditures were made must have contained one or more of the minerals

in commercial quantities. No suggestion was made in meeting the opposition to this measure that the phrase "by reason of producing or preparing to produce" was in any sense narrower than, the phrase "for producing or acquiring property for producing" which was agreed on in conference. It is certain that if the committee on Mines and Mining, who were interested in overcoming strenuous objections to this legislation in the closing days of Congress, had considered that this change of phraseology limited the obligation of the Government any further than the phraseology used in the conference report, it would have urged such limitation as an additional answer to the objections to the bill.

On the contrary, the changes of phraseology made by the Committee broadened the scope of the relief intended to be afforded by the act. Under the act as agreed on in conference authorizing the payment of expenditures "for producing or acquiring property for producing," there was no relief to be afforded the claimant who did not produce or acquire property for producing, but who expended money and labor in otherwise preparing to produce.

But under the phraseology prepared by the Committee on Mines and Mining relief was afforded for the net losses occasioned as well by expenditures for labor and other like expenditures, as expenditures in acquiring property in preparing to produce. That the change of phraseology broadened the scope of the original bill in this regard is further conclusively shown by the fact that the bill as first introduced, and as reported out of conference, carried no provision that the claimant should satisfy the Secretary that his expenditures were for, or upon property, containing one of the named minerals in commercial quantities. This

safeguard was first put in the bill by the Committee on Mines and Mining when it was changed to the theory of paying only the net losses "by reason of producing or preparing to produce" from the theory of paying the expenditures "for producing or acquiring property for producing."

This Committee, after going over the bill "step by step and paragraph by paragraph," raised the limitation of payments from the few cases arising from "acquiring property for producing" to the more general class of those who suffered losses "by reason of preparing to produce." This more general class embraced the class of those "acquiring property to produce." Had the Committee intended by thus broadening the language of the act to exclude those claimants who lost by "acquiring property for producing," surely it would not have, for the first time, inserted in the law that a claimant must satisfy the Secretary that his expenditures were for property containing one of the minerals in commercial quantities and his investments were not made for speculation, but in a legitimate attempt to produce, without limiting such expenditures and such investments to other than those in acquiring mining property by lease or purchase.

The general language of the enabling clause authorizing the Secretary to pay the net losses "by reason of producing or preparing to produce" embraces the petitioner's claim for losses arising from his contract of purchase. The language of the provisos, that the claimant must satisfy the Secretary that his expenditures were for property containing one of the named minerals in commercial quantities, and that his investments were not for speculative purposes, clearly authorizes the consideration, in arriving at his net losses, of his expenditures upon his contract of pur-

chase. The legislative history of the act confirms the plain language of the act that the Secretary is authorized to pay the net losses of a claimant, who in good faith and in a legitimate attempt to produce, makes expenditures for acquiring property as the first step in the preparation to produce manganese at the request of the Government.

3. Subsequent Legislation.

The first proviso of the original act limited payments and disbursements thereunder not to exceed the sum of $8,500,000. After the decision of the Court of Appeals of the District of Columbia in this case, and the judgment of the Supreme Court of the District of Columbia in *U. S. ex rel Chestatee Pyrites & Chemical Corporation v. Work, Secretary* (affirmed in *Work, Secretary, v. United States, ex rel Chestatee Pyrites & Chemical Corporation,* 298 Fed. 839) the Secretary submitted a report to Congress setting out the effect of these decisions, and attaching copies thereof to his letter, informing Congress that if these decisions were affirmed the money remaining in his hands undistributed might not be sufficient to pay all the claims in full, and in view of the limitation in the original act that the expenditures should not exceed the sum of $8,500,000, payment of claims had been suspended. (Report Committee on Mines and Mining, House Representatives, No. 601, 68th Cong. 1st Session, to accompany S. 2797). With this letter from the Secretary there was also sent to Congress the Opinion of the Attorney General heretofore quoted herein, page 10.

With the opinion of the Attorney General and the decision of the Court below before them, both holding unequivocally that it was the intention of Congress to

re-imburse claimants for losses suffered by reason of contracts to purchase property, Congress passed the following Act, June 7th, 1924, Cong. Record, 68th Cong., 1st Session, p. 11264:

> "That to enable the Secretary of the Interior to lawfully pay adjudicated claims arising under the provisions of the so-called war minerals relief act, entitled 'An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes,' approved March 2, 1919, as amended, the limitation in said act on the aggregate amount to be disbursed thereunder in the payment of said claims is hereby repealed."

This is at least legislative acquiescence in the construction put upon this statute by the Courts and by the Attorney General, and if the Court shall affirm the decision below its effect is to authorize the Secretary to immediately adjudicate all claims arising under the act regardless of the total amount involved. If Congress had not acquiesced in this interpretation of the law, it assuredly would not have passed this remedial act, since the Secretary had reported that the contemplated deficit would result only from the affirmation of these decisions.

II

THE SECRETARY'S RULING THAT THE CLAIM IS NOT REPAYABLE UNDER THE LAW IS AN ERRONEOUS DENIAL OF HIS AUTHORITY TO ADJUST THE CLAIMANT'S NET LOSSES THEREUNDER AND IS REVIEWABLE BY MANDAMUS.

1. The Court has always examined and determined for itself the asserted authority, or lack of authority, under which an administrative officer assumes or declines to act.

There is no dispute as to the facts in this case, nor is there controversy over what the Secretary did or did not do with reference to the item of the relator's claim for losses suffered by reason of his contract to purchase property at the request of the government for the production of manganese.

The War Mineral Relief Commission in reporting the claim to the Secretary informed him that "the amount paid on purchase of land has been *deducted* from the amount of the claim." (R. p. 6.) The Assistant Commissioner in reviewing the claim on the petition for re-hearing said: "The item involved is clearly an expenditure incident to the purchase of property and therefore is not payable under the law." (R. p. 8.) On appeal, the First Assistant Secretary said: "This claim was considered by the original Commission, and *eliminating* an item of $9,500 for purchase of property, award was recommended * * * and paid." As to the proposition that expenditures for property came within the purview of the law, he said: "The proposition has been repeatedly urged before the Department and it has been uniformly held that the law does not contemplate reimbursement for expenditures of this nature; that is for the property or mining rights. This ruling will not be changed and the decision of the Commissioner is affirmed." (R. p. 8.) These various holdings are set out as a part of the petition and are not denied by the answer. The answer specifically admits that the Commissioner "adhered to former rulings, held that money spent in the

purchase of real estate is not repayable as a loss under the law, either as originally passed or in the amendatory form," (R. p. 10) and that the Secretary affirmed this decision.

It is thus shown by the answer and the public records of the Interior Department filed as exhibits with the petition, that the Commission "*deducted*" from the claim before considering it, or as the Assistant Secretary said "eliminated" therefrom, the item setting up a claim for losses sustained by reason of the contract to purchase the property in question. It is further shown by the answer that upon the consideration of a petition for re-hearing, the Secretary adhered to his former rulings that the losses set out in this item of the claim were not "repayable as a loss under the law."

The plaintiff in error insists that these facts show that the Secretary did take jurisdiction of this claim and refused to allow it and therefore "mandamus does not lie." The most that can be said is that the Secretary *eliminated* this item from the claim filed, because, under his construction of the law, he had no authority to adjust and determine the losses accruing by reason of the contract to purchase. He considered the claim for such losses only for the purpose of determining whether or not the law authorized him to adjust and pay them. In that sense, he took jurisdiction to determine his authority. Having determined that he had no authority, under the law, to consider any losses occurring by reason of contract for the purchase of property, how can it be said that he took jurisdiction to adjust and determine net losses thus arising and disallowed them as not just and equitable?

While the judgment of Courts in determining their own authority cannot ordinarily be reviewed by man-

damus, this doctrine is not applied in full to administrative officers. *Int. Com. Commission v. Humboldt Steamship Company,* 224 U. S. 474.

In this case, the Court in commenting upon the power of the Interstate Commerce Commission to determine its own authority, said (p. 484):

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction, *Ex parte Harding,* 219 U. S. 363. But the full doctrine of that case can not be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, can not be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it can not be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed."

The writ of mandamus is sought in this case to com-

pel the Secretary to consider, under the Court's construction of the law, a claim which he has unwittingly declared he has no authority to consider. If, under a proper construction of the law, net losses suffered by reason of this contract to purchase manganese property are repayable, it follows that the Secretary has unconsciously disregarded the laws of Congress and has unwittingly refused to exercise the authority conferred upon him to adjust and determine such net losses.

The Court below held that the action of the Secretary in refusing to adjudicate this claim because of his erroneous construction of the law was reviewable by mandamus under *Louisville Cement Co. v. Int. Com. Comm.*, 246 U. S. 638; *Work, Sec. of Interior v. Mosier*, 261 U. S. 352; *Work v. U. S. ex rel McAlester-Edwards Coal Co.*, 262 U. S. 200.

The learned Solicitor General has made an effort to distinguish between the cases relied on by the Court below and this case. He insists that *Louisville Cement Co. v. Int. Com. Comm., supra,* is not in point because there the Commission held that its jurisdiction was barred by the statute of limitations, while here the Secretary took jurisdiction and determined that the law conferred no authority upon him to act upon claims of the character asserted. This would seem to be a distinction without a difference. In the *Cement* case the cement company filed with the Commission a complaint for the recovery of certain overcharges. As to some of these overcharges the complaint was filed within two years from date of the delivery of the shipment, but as to others, while the complaint was filed within nine months of the date of the payment of the overcharges, more than two years had elapsed after the date of the delivery of the freight. The Com-

mission authorized the payment of those overcharges for which complaint had been made within two years after the date of the delivery; but as to all others held that under Section 16 of the act to regulate commerce requiring complaints of this character to be "filed within two years from the time the cause of action accrues and not after," "they (the overcharges) are barred from our consideration."

The Cement Company sought a mandamus in the Supreme Court of the District of Columbia which was denied and its judgment was affirmed by the Court of Appeals. These courts held that the Commission entertained jurisdiction of that portion of the claim which was rejected, and in the exercise of its jurisdiction decided that the claim was barred; that this discretion was committed by law to the Commission and was not subject to control by writ of mandamus. This Court in reversing the lower courts and directing that the writ be awarded, said (p. 641) that the construction which the Commission gave to the two-year limitation placed the claim so beyond its jurisdiction that it could not consider it and were without power to grant the relief prayed for, and (p. 642):

> "That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Comerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474. If the Commission did so err, on the authority of many decisions, among them *Ex parte Russel*, 13 Wall, 664; *Ex parte Schollenberger*, 96 U. S. 369; *Hollon Parker, Petitioner*, 131 U. S. 221; *In re Gross-*

> *mayer*, 177 U. S. 48, and *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474, 485, the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision can not be reviewed on appeal or writ of error."

The court further said in determining that the Commission placed an erroneous construction upon the law (p. 644):

> "The unusual and purely fortuitious circumstance, that the character of this jurisdictional limitation on the power of the Commission chances to be such that the giving of a correct construction to it must result in determining the character of the decision which the Commission must render when the case is returned to it, can not affect the power of this court or that of the lower courts to define what that jurisdiction is under the Act of Congress or the duty of the Commission to accept and act upon such definition when announced."

The Act of March 2, 1919, expressly prohibits the bringing of suits in the courts for the recovery of these losses. No matter how flagrant may be the wrong committed by the Secretary in refusing to discharge the duty the statute exacts, or in holding that these losses are not repayable under the law, no other remedy save that by mandamus is afforded the claimant. If the decision of the administrative officer is final and conclusive on a pure question of law and binds the court, the claimant is without remedy, no matter how clear his right.

But upon purely legal questions the decision of an administrative officer does not bind the Courts.

School of Magnetic Healing v. McAnnulty, 187 U. S. 94. In the *McAnnulty* case the Postmaster General made an order after full hearing withholding the mail of the School of Magnetic Healing. In holding that the facts stated were not sufficient to permit the Postmaster General to make the order under the statute, the Court said (p. 110):

> "* * * and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

As said by the Court below, "The action relates simply to the question as to whether or not the Secretary has failed to exercise a power vested in him by Congress." In holding that the law did not authorize the payment of such claims, he necessarily held he had no authority to adjust them.

Whether or not all of the decisions as to when the courts will or will not determine, without regard to the administrative ruling, the proper construction of a statute can be reconciled, the court will always determine for itself the question of the authority or lack of authority of the administrative officer to act.

The case of *Knight v. Lane,* 228 U. S. 6, illustrates this and was a contest over a minor Indian's allotment. The Secretary first awarded the allotment to Knight upon the payment of $25,000 (which was paid) and directed deeds to be executed. Before the delivery of the deeds, the parents of the minor Indians applied for a rehearing, alleging their consent had been obtained upon misleading information. After a hearing in which Knight participated, the former decision was vacated, the Secretary declined to approve the deeds, and ordered the $25,000 to be returned. Knight insisted that his right became fixed by the former decision and sought a mandamus to compel the Secretary to deliver patent and clothe him with full legal title. Under these facts, Mr. Justice VanDeventer, speaking for the Court, said (p. 11):

> "The question for decision is, whether in the circumstances the Secretary was without authority to reconsider and vacate his decision of May 10, 1909, approving the proposed adjustment of the relator's contest. * * * The question therefore is reduced to this: Was his power of decision exhausted when on May 10, 1909, he approved the proposed adjustment?"

Here the court examined and determined for itself the question of the authority of the Secretary. Of the Secretary's final decision the court said, that having determined the question after hearing, and the decision not being arbitrary or capricious, it could not be reviewed on mandamus.

In *Roberts v. U. S.,* 176 U. S. 221, the Treasurer of the United States had determined that he had no authority to pay unpaid legal interest upon certain cer-

tificates alleged to have been redeemed by the Treasurer, on the ground that such certificates had not been redeemed by him. The Supreme Court considered and determined for itself the authority of the Treasurer to pay such interest and held that the certificates had been redeemed within the meaning of the law and awarded the mandamus prayed for.

In *Lane v. Hoglund,* 44 App. D. C. 310, 244 U. S. 174, the act of March 3, 1921, (26 Stat. 1095, 1099), put upon the Secretary of the Interior the duty of issuing a patent upon a homestead entry when no contest or protest had been made challenging the validity of the entry within two years of the issuance of final receiver's receipt. The Secretary had held that an adverse report of the Deputy Supervisor of the National Forest Service challenging Hoglund's entry, for insufficiency of residence and cultivation, filed but not acted upon by the Land Office within two years, was a *pending contest or protest within the meaning of the act,* had refused the patent and directed that the entry be cancelled. Hoglund sought a mandamus in the District of Columbia to compel the Secretary to recall the order of cancellation of the entry, to reinstate the entry upon the records, and to cause a patent to be issued. The District of Columbia Supreme Court refused the writ, but the Court of Appeals directed that it be granted. The case went to the United States Supreme Court, which held that the determination of the Secretary as to what was a *pending contest or protest was erroneous;* that the report of the Deputy Forest Supervisor challenging the entry was not *such a pending contest or protest,* and affirmed the judgment of the Court of Appeals awarding the writ.

In the *Hoglund* case the Secretary, by virtue of his construction as to what was a pending contest or pro-

test under the law, had assumed the power to refuse a patent after the two year statute of limitations had expired. The court held that he had erred in thus clothing himself with this authority to withhold the patent under his erroneous construction of the law and directed that patent issue. In the *Roberts* case, the Treasurer had refused to pay a balance of interest due on certain certificates saying that he had no authority under the law to make these payments since under his construction the certificates had not been redeemed. The Supreme Court did not agree with the construction of the Treasurer that he had no authority under the law to make these payments, declared that the certificates had been redeemed, and therefore awarded the writ commanding the Treasurer to act in accordance with the requirements of the statute as construed by the court.

2. In any event, whether or not losses arising from contracts to purchase or lease mineral lands are repayable under the law "is a matter of statutory construction, not finally entrusted to the discretion of the Secretary, but determinable in Court at the instance of the beneficiary as of right."

The Solicitor General insists that the Secretary did exercise his authority under the statute and in the exercise of that authority disallowed the claim under his construction of the law, and that this construction "is final, unless arbitrary and without any justification whatever." (Brief for Plaintiff in Error, p. 13.)

We do not think that this is the true test, but we have pointed out that the decision of the Secretary that he was not authorized to consider "expenditures" upon a contract to purchase property, under a statute authorizing him to consider "expenditures for or upon

property," was not only erroneous, but arbitrary. Therefore, even under the rule as contended for by the Solicitor General, the decision of the Court below is correct and should be affirmed. But whatever of doubt may have existed as to the binding effect of an administrative officer's determination of a question of statutory construction has been dispelled by the recent decisions of *Work, Secretary, v. Mosier, supra,* and *Work v. McAlester-Edwards Coal Co., supra,* both relied on by the Court below. As we read those decisions, the Court holds that where rights are dependent upon the construction of a law of Congress, the Court will examine this law, regardless of its determination by the administrative officer, and require such officer to act in accordance with the court's construction of the law. The learned Chief Justice of the Court below took this view of the law and discussed these two recent cases in the following language (R. p. 18):

> "Another decision which bears on the point is that of Work, Secretary of the Interior, v. Mosier, 261 U. S. 352, 43 Sup. Ct. 389, 67 L. Ed. 693. There the question was as to whether or not, under a statute, bonuses paid for oil lands were distributable as rents or as royalties. The relators alleged that the Secretary had placed a wrong construction upon the statute. The court said that the determination of the question was not 'a matter of discretionary construction by the Secretary,' but was a matter 'determinable in court at the instance of the beneficiaries as of right.' So here the question as to whether or not money paid for manganese land comes within the purview of the statute is a matter of statutory construction, not finally intrusted to the discretion of the Secretary, but

determinable in court at the instance of the claimant. This case was followed in Work v. United States, on the relation of McAlester-Edwards Coal Co., 262 U. S. 200, 43 Sup. Ct. 580, 67 L. Ed. 949, where the Secretary, construing a statute, denied the right of the coal company to make payments for certain lands and to have a patent issued therefor. The secretary insisted that since his construction of the statute had some basis therein, it was not reviewable by the courts. This court took a different view of the matter (277 Fed. 573, 51 App. D. C. 171), and was sustained by the Supreme Court of the United States. These decisions represent the latest expressions of the Supreme Court of the United States on the subject, and are binding upon us." (295 Fed., p. 228.)

In the brief for the plaintiff in error an attempt is made to distinguish this case from the *Mosier* and *McAlester-Edwards* cases, because, it is asserted, in the latter, under the court's construction of the law, only a ministerial duty remained for the Secretary to perform, that is, to pay the royalties in the *Mosier* case and to issue patent in the *McAlester-Edwards* case, while in this case the Secretary was vested with the discretion to determine what were the net losses of the claimant, if any. We submit that mandamus will as readily issue to require a quasi-judicial officer to act where he has erroneously determined the law did not require him to act, the manner of his performing his duty being left to him under the court's construction of the law, as it will require him to do a ministerial act which he has refused on account of a misconception of the law. This is strikingly illustrated by the *Mosier* case. There the court determined that bonuses were

distributable as rents and royalties, under the law, to the parents of minor Osage Indian children, contrary to the determination of the Secretary, even though the law vested in the Secretary the discretion to determine whether there had been a misuse or squandering of the minor's money. As to this the court, speaking through the Chief Justice, said:

> "Subject to the construction we have put upon the statute, the discretion is vested in the Commissioner to determine in each case whether, in his judgment, there has been misuse or squandering, and, within the same limitation, to decide what is misuse or squandering."

Applying this language to the case under consideration, we may say that, subject to the construction which the court puts upon the statute that the claimant's net losses arising from the contract to purchase manganese lands are repayable under the law, the discretion is vested in the Secretary to determine whether there have been net losses, and within the same limitation, what are net losses.

The plaintiff in error relies upon the class of cases of which *Hall v. Payne*, 254 U. S. 345, and *Alaska Smokeless Coal Co., v. Lane*, 250 U. S. 549, are the most recent. We submit that the cases relied upon by the court below, being the most recent expressions of this court, lay down the true rule to be followed, that the construction of statutes is always a matter for the courts to determine.

In the *Alaska Smokeless Coal Company* case the Secretary was called upon to determine whether the facts adduced before him constituted the opening or improving of a mine. He held that they did not, and the Su-

preme Court said such a decision was impregnable to mandamus. However this case may be differentiated from the subsequent decision in the *Mosier* case, there was at best a question of mixed law and fact to be determined, and in any event the Secretary's authority to act was not called in question, merely the correctness of his decision upon the facts and law.

In the *Hall* case a mandamus was sought to compel the Secretary to recall and reverse decisions adverse to Hall's asserted rights and to allow him to make a homestead entry on certain lands in Montana, the right to which entry had been allowed to one Kennedy, the Secretary having held that "Kennedy's application being prior in time, is also prior in right." Here, again, the Secretary was required to apply the facts in order to determine between the applications of Hall and Kennedy, and under the law and the facts, determined the matter in favor of the latter. In this case, the decision of the Secretary was plainly right, but the language of this and earlier cases does not seem to accord with the decision of the Chief Justice in the *Mosier* case.

Indeed the decision in the *Mosier* case would seem to have brushed aside the cobwebs which have been woven about the law of mandamus in the construction of statutes. There can be no "twilight zone" in the interpretation of the law. The determination by an administrative officer of what the law means is either right or wrong. A construction of a statute is not a possible construction unless it is the true construction, and in a case properly before the court, by mandamus or otherwise, the court must determine this true construction. This, we conceive to be the decision in the *Mosier* case.

In any event, we again submit that in none of the

cases in which the court has refused to construe a statute where the administrative officer had acted under his own interpretation, was the asserted authority or lack of authority of the officer to act in question.

III

THE DEFENDANT IN ERROR IS NOT BARRED FROM HAVING HIS CLAIM CONSIDERED BY THE SECRETARY BY REASON OF HIS ACCEPTANCE OF SUMS PAID FOR OTHER LOSSES.

Even though the law authorizes the payment it is now insisted that the claimant is barred from asking the Secretary to pay such amount as may be just and equitable to reimburse his net losses suffered by reason of his contract to purchase this mineral land because he accepted an award for other losses. The fact that this claim was filed along with items which were considered on their merits, no more estops him from again asking what he is under the law, "in justice and equity entitled to" than if the claim had been separately filed and refused for the identical reason of the Secretary's lack of authority under the law to pay it.

The claimant filed a petition for rehearing of the claim after the passage of the Amended Act of Nov. 23, 1921. The petition was filed under the third regulation prescribed by the Secretary, as follows:

3. If the claim has been rejected, or partially rejected, on other grounds than the question of stimulation, the errors complained of should be stated in detail in the written motion for rehearing.

Upon consideration of this petition, the Secretary to whom the execution of the law is committed, did not reject it upon the ground that the acceptance of the award for the other items estopped the claimant from asking an additional award of this unconsidered item, but upon the sole ground that the statute did not authorize the payment of such losses.

It is said that the award was made conditional upon its being in full settlement of the claim. The Commissioners recommended an amount to be paid in full settlement of the claim after "deducting" the item of $9,600, for which the law authorized no payment. The Secretary's award (R. p. 7) was made without condition.

The item of $9,600 for the purchase of the property played no part either in the award or the acceptance. The claimant in accepting the award for the items considered by the Secretary, expressly stated that he did not "waive any right to further award under any additional remedial legislation which may be passed and which might permit further payment." (R. p. 9.)

The amended act provides that all claimants who upon written or published request "in good faith expended money in producing or preparing to produce any of the ores" named in the original act "shall be reimbursed such net losses as they may have incurred, and are in justice and equity entitled to from the appropriation in said act." The rejection of the claimant's item for the purchase of property was made on "rulings contrary to the provisions of this amendment" as found by the Court below. This amendment clearly authorized the Secretary to examine all claims again, and the Secretary reopened this case, and adhered to the former ruling that he had no authority under the original or amended law to adjust such

losses.

No principle of the law of estoppel, therefore, arises in the case. The relation between the government and the claimant is not changed by the latter's acceptance of the admittedly just award for the items passed upon. No less could have or would have been awarded, and the item of purchase of property was not considered either in making the award or in accepting the award that was made.

This claim is not founded upon contractual right, but rests upon the statutory authorization to the Secretary to pay all just claims. The proceedings before the Secretary were not adversary; it was not a matter in dispute between claimant on the one hand and the Government on the other, but merely an examination into the justice and equity of the claim. If the law authorizes the payment the justice and equity of the claim is conceded. The payment of the award for the clear loss which the Secretary found upon proof it was his duty to pay did not constitute a compromise of any claim in dispute, and no estoppel by implication or otherwise arises. It was hardly contemplated by Congress that a claimant who accepted an award which the Secretary found just could not again assert a claim for a loss which the Secretary had refused to consider under a plain misapprehension of the law. Surely in this case Congress had no dream that technical legal defenses should be made in mere matters of procedure. In addition to this, the whole spirit of the original and amended acts is one of fair treatment. If the law authorizes this payment nothing could be more odious than to attempt to apply the doctrine of estoppel in order not to do justice and equity.

As to this proposition the court below said (R. p. 18):

"The acceptance of the amount awarded to the relator did not bar him from relief with respect to the $9,600 item. The Secretary granted a rehearing after the acceptance, reconsidered his decision touching the matter, and rejected the item anew. He did not think that the relator was barred from a rehearing by the acceptance, or, if he did, he waived the bar and proceeded as if it had no existence. If the Secretary had taken jurisdiction of the claim and had rejected it in whole or in part on the ground that it did not represent a loss incurred by him on account of money paid for manganese property, there would be force in the contention that having accepted the decision of the Secretary he had no right to reopen the matter. But that is not the situation. The Secretary, as we have said, did not go into the merits of the matter at all, but simply refused to touch it, on the ground that he was not authorized to do so.

"Apart from that, the amendatory act provides in substance that all claimants who in good faith expended money in producing or preparing to produce any of the ores or minerals named should be reimbursed for such net losses as they had incurred, and that if in claims passed upon under the original act awards had been denied on rulings contrary to the provisions of the amendment the Secretary might award proper amounts or additional amounts. In this case the rulings of the Secretary rejecting the relator's claim were contrary to the provisions of the amendment, which, as we have just seen, provided that persons who in good faith expended money in preparing to produce minerals should be reimbursed for such net losses as they had incurred. In view of these con-

siderations we do not think relator was barred by the acceptance."

The Secretary having refused on account of lack of authority "to touch" the matter at all how can acceptance of any sum upon other awards bar recovery of this claim?

CONCLUSION

The judgment of the Court below is plainly right and should be affirmed.

Respectfully submitted,

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Nov. 15, 1924.

IN THE

Supreme Court of the United States

October Term, 1925.

No. 370.—Appealed from the Court of Appeals of the District of Columbia.

[redacted]

Plaintiff in Error,

vs.

[redacted]

Defendant in Error.

[redacted]

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CASES

MISCELLANEOUS

IN THE

Supreme Court of the United States

No. 272

OCTOBER TERM, 1924.

HUBERT WORK, SECRETARY OF THE INTERIOR,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA EX-REL LOGAN RIVES,
Defendant in Error.

PETITION FOR RE-HEARING, EX-REL LOGAN RIVES.

In Limine.

After completing this petition, we are concerned by its length and the time necessary for its consideration,—yet, we feel justified in filing it as it is.

This case, in reality, is a test case upon which the rights of many citizens depend.

Like suits are pending which will eventually reach this court; therefore, a correct determination of this case will settle not only this but other cases as well.

Aside from the necessities of the case, we feel that this reason justifies the length of the petition.

The main grounds for a re-hearing are to be found in the first forty pages. If a judgment of affirmance necessarily followed upon recognition of these erroneous grounds—as in the usual line of cases—we would have rested at this point.

Granting the errors claimed, it still remains the duty of this court to determine the correctness of the interpretation placed upon the Act by the trial court.

* * * * * * *

A RE-HEARING is requested because the opinion of this court is predicated upon vital facts assumed as true and so established by the pleadings as a matter of law, whereas the truth is, they are neither true in fact nor so established as a matter of law. *The facts assumed were not intended by the return.*

Furthermore, the facts assumed make an entirely different case in theory from that conceded in the trial court and in the Court of Appeals, upon which those courts rested their decisions.

We respectfully submit that on final appeal it is too late for Plaintiff in Error to assume a position inconsistent with the pleadings and his explanations in the lower courts as to what was intended by his alleged plea in bar.

There is and should be no dispute of fact in this case and, once understood, there is but one contention of importance for decision and that is:

Has Congress the power to delegate to an executive officer or any other inferior tribunal, the exclusive right and duty of interpreting an Act of the Congress of the United States and to make such interpretation "conclusive and final" and, even though erroneous, not subject to review in any manner by the courts of the United States?

Such a question obviously necessitates a consideration of the Constitution to determine whether or not Congress has any such power and, of course, whether or not the "conclusive and final" interpretation or construction of an Act of Congress and declaring the law as a result thereof, is or is not the exercise of judicial power.

This question, of course, assumes that the Act does delegate such power. We indulge in this assumption for purposes of argument only and do not concede it as a fact. We will show that Congress did not delegate any such power *and that this contention results from a misunderstanding of language in the Act, inserted for an entirely different purpose.*

We concede the soundness of the court's decision *upon the facts assumed,* particularly the law as stated by the Hon. Chief Justice in relation to mandamus. We concede that the Secretary's decision *on controverted facts* respecting any item of loss claimed, wherein he exercised a just and reasonable discretion *on the merits,* is "conclusive and final" and not subject to review by any court in any manner. Such decisions are final on the facts, but we do not concede that the Secretary's decision *on a question of law* is "conclusive and final" and we do not concede that Congress has, or that it can, make such decisions "conclusive and final," nor do we concede that the Secretary can thus escape performance of a duty imposed by Congress.

The Foundation of This Case.

It is a matter of history, verified by Government Reports, that on April 6, 1917, the reserves of certain war minerals in this country, in the form of actual ore,—set by Government engineers,—was very much less than would be required for the duration of the war.

It is a matter of common knowledge that this country

then depended upon imports from foreign countries for its supply of certain necessary minerals.

The Executive Department, realizing the uncertainties of war and the great use of ships for transporting troops and supplies to France, recognized that it was its duty to develop the latent resources of this country for these necessary minerals; therefore, it summoned to Washington by peremptory command many citizens in the mining industry, made known its needs and then requested that they immediately proceed to produce these rare minerals for Government use in the war, under assurances that they would suffer no loss and that Congress would pass appropriate legislation for their protection.

Relying on these assurances, these men complied with the request of their Government and produced.

The promise of the Executive Department was fulfilled by the passage of what is known as the original War Minerals Bill, October 5, 1918, under which the Government was authorized to take over the control of all such mining operations, etc. This Act made good the promise of the Executive Department and ensured a market for the duration of the war and two years thereafter.

On November 7, 1918, President Wilson issued an executive order directing the Secretary of the Interior to administer this Act.

On November 11, 1918, the Armistice was declared.

Secretary Lane hesitated to administer the Act of October 5, 1918:

(1) Because it was a war act for war purposes; that the war, in his opinion, was over and that the necessity for its passage, etc., was a matter of history;

(2) That, if administered, the entire appropriation of $50,000,000 was certain to result in a loss to the Government.

Secretary Lane summoned these mining men to Washington, frankly stated his reasons for wishing to be relieved from the administration of this Act and requested their patriotic cooperation in an amicable adjustment of the situation, with the result that it was agreed that administration of the Act be waived and, in lieu thereof, the Government would pay net losses suffered.

Congress then passed the Act under which these proceedings are pending, known as the War Minerals Relief Act, and the Act of October 5, 1918, "died abornin."

The War Minerals Relief Act directed the Secretary to adjust and pay the net losses suffered by reason of producing or preparing to produce at the request of the Government; and it is under this Act that this case comes to this court.

Under the Relief Act, Defendant in Error duly filed his verified claim alleging a net loss of $55,204.15. It included an item of $9,600 alleged to be a loss suffered by him for the purchase of a mining property, to wit: the mine he operated and from which he produced the manganese requested by the Government.

The Secretary eliminated this item of loss, refused to consider it, but did adjust the balance of the claim and paid Defendant in Error the sum of $23,047.36.

Defendant in Error then filed a petition in the Supreme Court of the District of Columbia alleging the Secretary's refusal to consider and adjust this item of loss and prayed for a writ of mandamus compelling the Secretary to consider it.

It is conceded that the petition alleges a cause of action and, standing by itself, justifies the issuance of the writ.

The return did not traverse but affirmatively averred that the Secretary "*adhered to former rulings, held* that money spent in the purchase of real estate or on a contract for the purchase of real estate is not repayable as

a loss under the law . . ." and then set up a plea in bar as a defense, to wit: an alleged consideration on the merits, hence the exercise of a discretion not controllable by mandamus.

A demurrer to the return was sustained. Plaintiff in Error declined to amend and elected to stand on his return. The writ issued and an appeal followed.

The Court of Appeals affirmed the judgment and the case comes to this court on writ of error.

Before the case can be considered on its merits, we must first correct what seem to us to be the erroneous assumptions of fact upon which the opinion rests.

I.

Legislative History Relied on By the Court—(a) Relates to an Entirely Different Bill, and Not to the Act Passed. (b) Even So, the Court's Opinion Is Founded on a Segregated Part of it's History and Not Upon it's Full History. (c) The Full History, Ipso Facto, Destroys the Assumption Relied Upon. (d) The Secretary Had no Right to Resort to Legislative History for Purposes of Interpretation.

In discussing the ruling by the Secretary rejecting losses suffered on purchase of property, this court said:

> "The ruling was based in part at least, on the legislative history of the bill, which showed that it originally contained an express provision for expenditures for real estate as a proper element in calculating the net losses to be re-imbursed, and that this provision was objected to as involving too speculative a subject matter and it was stricken out."

The objection referred to was made by Senator Smoot in the Senate on January 28, 1919, *and was an objection to an entirely different bill* and not to the Act under which these proceedings are pending.

It is true, as stated by the court, that the words, "or acquiring property for producing" were, upon suggestion of Senator Smoot, stricken from the bill which was *then* before the Senate and was thus passed by the Senate.

In substance, this was as much of the legislative history as was told this court either at the argument or in the briefs.

If we were now dealing with the bill as passed by the Senate, the irresistible conclusion would be that Congress did not intend payment of such losses and necessarily the conclusion of the Secretary in refusing to consider same must be right. Such would be fair, natural and reasonable, and if the matter rested here, this petition would never have been filed.

The War Minerals Relief Act originated in the Senate. It was added to what is known as "The Dent-Chamberlain Act" by that body, and was Section 7 of the bill as it passed the Senate, and was and is generally known as the "Henderson Amendment."

The Dent-Chamberlain Act had passed the House and was pending in the Senate. It was a bill of tremendous importance and carried an appropriation of some two and a half billion dollars. It had occupied much time and received a great deal of consideration by Congress. The session was getting well along and the Congressional Record shows that those in charge of the bill and interested in its passage, realized the necessity of getting the bill passed by the Senate and to conference, that it might be agreed upon and become a law before March 4, 1919.

Senator Henderson, Chairman of the Senate Mines

Committee, having charge of this particular amendment, accepted all amendments without debate.

Cong. Rec., p. 2273.

The Dent-Chamberlain Bill as amended was passed by the Senate January 30, 1919, and on January 31, 1919, it was reported back to the House for a conference.

Cong. Rec., p. 2414.

At the first meeting of conferees, either at the request of Senator Smoot but certainly with his acquiescence, the words stricken out on his motion on January 28, 1919, were, by the conferees, *restored* to the Henderson Amendment with the added words, suggested by Senator Smoot, *"in good faith,"* so that it again included an express recognition of such losses, to wit:

"or in good faith acquiring property for producing."

Cong. Rec., p. 3171.

On February 11, 1919, the conferees submitted to their respective houses their report and revised Henderson Amendment, which contained the words: "or in good faith acquiring property for producing," *in which report the Senate, including Senator Smoot, concurred.*

Cong. Rec., p. 3171.

Thereafter, the bill was settled, so far as the Senate was concerned. It never receded from its position and its last act respecting the disputed matter under consideration was to approve the action of the conferees restoring the language, as aforesaid.

The Congressional Record shows that a majority of the conferees of both houses reported favorably upon the bill containing the said words added at conference.

A Minority Report by House conferees was submitted to the House, and on two occasions the Minority Report was sustained by the House and the bill re-submitted to conference.

Cong. Rec., pp. 3362, 3981, 3089.

On February 25, 1919, the Conference Committee reported no agreement to the House.

During this entire period, approaching the end of the session, the Henderson Amendment, for which the Senate, including Senator Smoot, was holding, contained the words:

> "Or in good faith acquiring property for producing."

The objection to the Henderson Amendment on the part of the minority House conferees was not to this portion of the language or purpose of the bill,—the House minority conferees and the House itself objected to any amendment at all being attached to the House bill by the Senate.

On February 25, 1919, the houses were at deadlock. The Senate refused to yield and the House refused to accept the Henderson Amendment, either with or without the words under consideration.

In the meantime, the House Mines Committee met. It realized that something must be done. It was done. The Committee instructed Mr. Wingo, then a member of that Committee and presently in Congress, to re-write the War Minerals Amendment. Mr. Wingo did so. He wrote the bill as it is and, on February 25, 1919, it was offered by Mr. Foster, Chairman of the Committee on Mines and Mining, *as a substitute measure,* in place of the Henderson Amendment.

Cong. Rec., pp. 4259–62.

This substitute measure was an entirely different measure in form from that passed by the Senate.

Mr. Foster then offered a motion to instruct the House conferees to agree to this substitute measure, with the

result that on February 26, 1919, the House conferees reported the bill agreed upon with the Foster Amendment and, on February 27, 1919, the Senate and House adopted the Conference Report and passed the bill, which was approved March 2, 1919.

Cong. Rec., pp. 4259–62; 4351; 4414–4498.

The only reason ever assigned by the Commission for the rejection of and refusal to consider real property losses suffered in good faith by reason of preparing to produce at the direct request of the Department of the Interior, *has always been based upon a misconception of the legislative history of another bill.*

The fact that the said words were restored to the bill and then voted upon and sustained by the Senate, including the vote of Senator Smoot, seems to have been entirely overlooked, even after a Committee of Congress had investigated the administration of the Act and had reported:

> "The Committee is of the opinion that the Commission *erred in its interpretation of the legislative intent*, its interpretation and application of the provisions of the Act, and the application of the provisions of the law to the facts."
>
> Rep. No. 762, 66th Cong., 2nd Sess.

Utilizing the full history of any bill that failed of passage, in construing another, is in itself improper and contrary to many decisions of this court.

We know of no rule of law permitting the use of a *partial* history of any bill for any purpose.

It is almost axiomatic, that debates in Congress are most unreliable guides to the meaning or intent of any law, and to take a mere isolated exchange of remarks upon the floor of the Senate, without looking further, especially where addressed to an entirely different bill

and not to the Act passed by Congress, and base upon it a decision of such import as this, will not fail to arouse the suspicion that the Commission's decision was arbitrarily pre-determined and that the reason assigned, was searched for and selected because it trended in the direction desired.

It is only where the words of a statute are doubtful, obscure or contradictory, that the intention of Congress, through its legislative history, can be resorted to in order to find its meaning.

Where a statute is expressed in plain and unambiguous terms, Congress must be held to mean what it has plainly expressed. In the language of Chief Justice Marshall:

> "A statute is its own best expositor."

As otherwise expressed by this court:

> "Where the intent is plain, nothing is left for construction. The province of construction lies wholly within the domain of ambiguity."

The language in the enacting clause in this Act, to wit: "adjust, liquidate, and pay such net losses as have been suffered by any person, *by reason* of producing or preparing to produce," is so simple and direct that we are content to rely on it as it is,—with the statement that neither its object nor the intent of Congress has ever been questioned, save as to two elements of loss.

The object and intent being apparent from the language used, no obscurity, no contradictions, no ambiguity appearing, the Secretary had no right to resort to legislative history for any purpose,—not even the legislative history of the Act passed.

The law permitting resort to legislative history for pur-

poses of interpretation was declared by this court years ago. Even though the Commission may have concluded that there was some justification for its position in the colloquy in the Senate, yet we see no justification for its use as a matter of law. Even though it be conceded that there is apparent plausibility in the Commission's position, yet there is and can be no excuse for its ignorance of the law. If it had been as zealous in looking up the law as it was in searching the Congressional Record for isolated statements to support its view, it would have learned that it had no legal right to resort to such statements for any purpose.

> "In expounding this law the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in debates which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.
>
> "The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken, is in the Act itself, and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the public history of the time in which it was passed."
>
> *Aldrich* vs. *Williams*, 3 Howard, 24;
> *U. S.* vs. *The Freight Assn.*, 166 U. S. 318;
> *U. S.* vs. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310.

There was and is no warrant in law for resorting to legislative history either to ascertain the object or the intent of the Act.

From legislative history, we learn two relevant and important facts:

First, that the *only* reason ever assigned for refusing to adjust losses on account of purchase of property, is

not supported by the full legislative history of the bill in the Senate. On the contrary, the last expression of the Senate on the subject, recognizes and approves such loss. If this action has any significance at all, it is that the Senate intended that such loss, if any, should be adjusted and paid.

Secondly, that the legislative history relied upon to sustain the ruling was of an entirely different bill, and did not relate to the Act passed.

In any event, it neither supports the Secretary's rulings nor the opinion of this court.

II.

Losses on Purchase of Real Property, i. e., the Mine Itself, Have Never Been Considered By Any Secretary for Any Purpose, Save As a Matter of Law, to Arbitrarily Reject Them. (a) This Fact Is Admitted By the Pleadings. (b) The Return Does Not Establish the Contrary. (c) The Record Discloses no Discretionary Action By the Secretary, Therefore Mandamus Properly Issued to Compel the Secretary to Consider This Item of Loss on its Merits.

The opinion assumes another fact as established by the record and, in support thereof, relies upon the return, to wit:

> "* * * The answer further denies that the Secretary refused to consider the claim, but avers that he did so fully and rejected it.
>
> "* * * It is sought to bring the present case within this class by the averment in the petition that the Secretary of the Interior has refused to take

> jurisdiction of the claim for the loss of $9,600 through the real estate contract. This averment is met by a denial in the answer and *the affirmative allegation that the Secretary did consider the claim and disallowed it for cause deemed by him to be good.*"

If the quotation be true as a matter of fact and be properly averred as a matter of law, so that it must be accepted as true for the purposes of this case, of course, the judgment of this court is correct. It would then be squarely within the rule announced in the Decatur case. If the Secretary assumed jurisdiction of this item of loss *and proceeded with it,* heard the proof and investigated same on its merits and then disallowed it "for cause deemed by him to be good,"—unless concededly arbitrary and capricious,—his decision is "conclusive and final" and not subject to review by any court in any manner.

Mandamus never controls a discretionary duty fairly exercised and we have never claimed that it does or will. As a legal principle, this is too elementary and too well established to be controverted.

This court has assumed, it seems to us, that, because the return contains the averments noted, they must be accorded their full face value and therefore control the decision of the case.

The fallacy of this assumption lies in the fact that it ignores other admitted facts, destroying their probative value.

The petition in this case concededly states a cause of action and justifies the issuance of the writ by the trial court. Standing by itself, it covers every condition required by the Acts of Congress and establishes that a loss was suffered for purchase of real property "by reason of preparing to produce" manganese at the request of the Department of the Interior. If any essential averment is omitted, it is supplied in the return.

From the court's opinion, it is apparent that the court did not get clearly in their minds the purpose of the petition.

The writ is not sought to compel the Secretary *to allow* the item of loss claimed. It is sought *solely and only* to compel the Secretary to consider it as any other item claimed, and declare such loss, *if any.*

As we will point out later, even though the writ issues, it may be that, on the facts, the Secretary will be justified in denying it in toto. The issuance of the writ does not and cannot have the effect of compelling the allowance of the amount claimed—therefore, in and of itself, it takes nothing from the treasury.

Whether the return pleads a legal defense in bar is the question to be determined. A return is good on demurrer if it raises an issue of fact or sets up a plea that defeats the petition, as a matter of law. *The return in this case does neither.*

The petition attaches, as exhibits, *in haec verba,* copies of the official rulings by the Secretary of the Interior adjusting the claim. They are not denied and stand conceded.

Exhibits B, C, D and E; Tr. pp. 5–8.

In the first recommendation by the Commission, it is stated:

> "The amount paid on purchase of land has been *deducted from the amount of the claim.*"

The second recommendation states:

> "The item involved is clearly an expenditure incident to the purchase of property and, *therefore, is not payable under the law.*
>
> Provision for repayment of such losses was stricken from the original War Minerals Bill and the amendment affords no relief in this respect."

Upon appeal, the first Assistant-secretary of the Interior affirmed the decision of the Commissioner, holding:

> "This claim was considered * * * and *eliminating* an item of $9,500 for purchase of property and an award was recommended of $23,047.36, which was paid.
>
> "Claimant filed motion for rehearing * * * contending that the aforesaid expenditure for property *was within the purview of the law. This was denied by the War Minerals Relief Commission* and exceptions have been filed.
>
> "The proposition has been *repeatedly urged* before the Department, and *it has uniformly been held that the law does not contemplate reimbursement for expenditures of this nature; i. e., for property or mining rights.* The ruling will not be changed and the decision of the Commissioner is affirmed."

As the pleadings stand, the return admits every material allegation, including the Secretary's rulings respecting the item of loss in controversy.

The question thus narrows itself to this:

May admitted official rulings be denied or negated by averments in a pleading wholly inconsistent with what has been so solemnly declared and so plainly stated?

When a return is tested by demurrer, all facts well pleaded are accepted as true,—every presumption is against the pleader, for it will be presumed that he pleaded every fact as strongly as he possibly could in his favor. His defense must, if true, be a complete defense and must be consistent with the admitted allegations of the petition.

Parties litigant are never permitted in a verified pleading to aver or admit in one breath and deny in another. As is commonly expressed, litigants are not permitted to blow hot and cold to suit their convenience. No litigant

should be permitted to aver or admit facts as true, and, when his purpose suits, deny them. A plea in bar must be consistent with the case made and admitted, to which the plea is directed.

With these principles of pleading in mind, let us test the plea as a defense.

The Secretary admits that the amount paid on purchase of lands was *eliminated* and *deducted* from the amount of the claim as filed; *that it is not payable under the law;* that Defendant in Error claimed that the expenditure *was within the purview of the law,* and that this contention was denied by the Commissioner and sustained by the Secretary; that *it has uniformly been held that the law does not contemplate reimbursement for expenditures of this nature.*

If an item of loss claimed is not an allowable item of loss under a statute because not within its purview, or, not payable under the law, or, the law does not contemplate payment of such loss, and is eliminated or rejected for such reasons,—how, in the name of reason, can the same person, in the next breath when called to account, be permitted to say that he rejected it for an entirely different reason?

In other words, if a particular loss is eliminated or rejected because not within the purview of the law, how is it possible to exercise discretion on its merits within the purview of the law?

The rejection of this item of alleged loss under the Act because not within its purview, is so absolutely inconsistent with the averments in the return of alleged discretion exercised in relation to its merits, as to amount to a legal absurdity,—therefore, the return does not and cannot in law, plead a defense of discretion exercised on the merits.

The rulings of the Secretary are so clear and unequivo-

cal that they cannot be twisted to mean anything than what is so plainly stated.

They mean but one thing,—that the Secretary, in construing the Act, determined as a matter of law, that he was not authorized by Congress to consider or allow such a loss under any circumstances or for any purpose, because such loss is not within the purview of the Act.

Action based on such reasoning neither requires consideration on the merits of the particular item, nor permits the exercise of discretion; in fact, it positively negates consideration and discretion on its merits, and plainly and unequivocally establishes the averments in the petition that the Secretary refused to take jurisdiction of this particular item of loss for any purpose, save to reject it.

If the Secretary rejected said loss because of a discretion exercised on the merits as apparently claimed in his return, he necessarily concedes that such loss *is* within the purview of the law and *is* repayable under the law and that he *has* jurisdiction under the law to adjust it.

If the Secretary reject or eliminate such loss because he is not authorized by the law to consider it for any purpose, as stated in his rulings, jurisdiction is denied and it is *legally impossible* to exercise any discretion in relation to it.

Re-stated, our position is:

A denial of losses suffered because not an allowable loss under the Act *precludes* the exercise of discretion; a denial because of a discretion exercised *concedes* the loss in a proper case.

Exercising discretion on the merits of any particular item not warranted or authorized by law is an idle act and presents but a moot question, which is not a legal defense in any court. "A thing cannot at the same time

be and not be." If the Secretary was not authorized by the law to consider such expenditures, he had no jurisdiction to determine whether the claim was just and equitable. The most that can be said is that he took jurisdiction to determine that he had no jurisdiction.

The return seeks to establish that the Secretary of the Interior, by refusing to take jurisdiction of this item, has taken jurisdiction of it.

The lower courts recognized the danger in the establishment of such a precedent. Under a decision supporting such a doctrine, any executive officer, by establishing the fiction, that by refusing to perform a ministerial act in taking jurisdiction of matters assigned him by law, he had exercised the discretion vested in him as an administrative officer;—could always defeat the writ of mandamus.

The demurrer to the return was also rightly sustained because it alleges a discretion exercised respecting action taken pursuant to *"a clearly defined rule,"* or, as otherwise expressed, pursuant to *"a hard and fast rule."*

"Discretion" is the bone of contention in this case. Its existence or non-existence determines the propriety or impropriety of mandamus. Plaintiff in Error seems to think that it has no legal limitations and that it can be resorted to "ad libitum."

What is "discretion"?

It may be generally defined to be:

> "The power to discriminate and determine what, *under existing circumstances,* is right and proper."
>
> "The lawful exercise of discretion involves a fair consideration of all peculiar features of a particular question to the disposition of which it is to be applied; it excludes not only the play of fancy or caprice, but also servile adherence to a hard and fast general rule, and is confined within those limits

within which an honest man, competent to discharge the duties of his office, ought to confine himself."
18 C. J., 1134–5.

If we have correctly defined a lawful discretion, where in this record is there an admission or legal averment of "*existing circumstances*" respecting the item in question, upon which the Secretary could and did exercise a lawful discretion? Where is there legal averment or admission of a "*fair*" consideration of all peculiar features of the particular question involved?

The absence of these "existing circumstances" is what we are complaining of. Because of his ruling, the Secretary prevented us from presenting our side of the "existing circumstances," and because of it he refused to make any investigation whatever on the part of the Government.

The purpose of this suit is to compel him to do so,—to investigate and make findings. Having refused to do so, there was nothing upon which his alleged discretion could operate.

"The term (discretion) implies the absence of a hard and fast rule or a clearly defined rule."
18 C. J., 1136.

The Secretary's rulings in this matter show that losses on purchase of real property were eliminated because of a clearly defined rule applicable to all claimants and under all circumstances and conditions.

The rule was made as a matter of law because the Secretary concluded that the legislative history reflected the intent of Congress.

The Secretary's decision states that the proposition has been *repeatedly urged* before the Department and that *it has uniformly been held* that the law does not contemplate reimbursement for expenditures of this nature.

"Repeatedly urged" and "uniformly held"!

This is an express declaration of a clearly defined rule applicable to all alike,—"the operation of the same formula to everyone."

The question is settled in this court. In an opinion by Mr. Justice Shiras, it was held:

> "The good faith of the master and his reasonable exercise of discretion *must be considered and determined in the light of the facts in each particular case. The term 'discretion' implies the absence of a hard and fast rule. The establishment of a clearly defined rule of action would be the end of discretion,* and yet 'discretion' should not be a word of arbitrary will or inconsiderate action. Discretion means the equitable decision of what is just and proper under the circumstances. Discretion means the liberty or power of acting without other control than one's own judgment."
>
> *S. S. Syria* vs. *Morgan,* 186 U. S., 1; 46 L. E., 1027.

The Secretary is not permitted to evade the rulings of his own Department, concededly pursuant to a clearly defined rule, by a plea wholly inconsistent with their meaning. He is estopped from denying official action regularly had. The rulings are conclusive and bind everybody.

If the rulings by the Secretary are right, the return does not plead a legal defense; if the return is right, the rulings are wrong.

It is impossible to reconcile the alleged plea with the other averments and admissions in the return.

The Secretary is bound by the rulings of his own Department and can not, in a purely collateral proceeding, without averments of fraud, mistake, etc., in the rulings themselves, be permitted to deny same or evade

the natural consequences thereof, by averments wholly inconsistent therewith.

If those portions of the return referred to in the opinion, be taken literally and afforded the weight and meaning assumed in the opinion, then we say that the return deceives the court as to the true facts, for the fact is,—*and there is no controversy about it,*—that in all claims in which real property losses were asserted under the Act, the amount claimed has been eliminated or deducted from the claim without investigation or consideration of any kind on its merits and the remainder (except interest paid), has been investigated and considered on its merits, and an award made or denied accordingly; *and the record establishes this condition in this case.*

The exact situation has been tersely and aptly expressed as follows:

> "We never considered either question (losses for property and interest paid), except to consider the statute to determine that we were not authorized to consider them at all."

This language expresses clearly and accurately the exact situation disclosed by this record and is all that was ever intended that the return should mean. It is all that it can mean.

When this case came on for hearing before the learned trial judge, he asked Counsel the direct question as to what was meant by these allegations in the return, and Counsel replied in substance, that it was not intended to mean a rejection of the loss because of a discretion exercised on the merits of the loss, *i. e.*, in relation to its particular facts, but that it did mean and was intended to mean that, in construing the statute, the Secretary

had determined as a matter of law that such loss was not a constituent part of the "net losses" which Congress had directed him to adjust and pay; therefore, it would not be lawful to consider such a loss in any claim;—that Congress granted to the Secretary the right and power to construe the Act as, in his discretion, he should determine to be just and equitable, and, having done so, that this constituted the cause "deemed by him to be good," and that, right or wrong, his decision was "conclusive and final" and not subject to review by any court in any manner.

The learned trial judge then said in substance:

> "You mean, then, that the Secretary determined that the construction of the Act as a matter of law was within his discretionary powers under the Act?"

To which Counsel replied:

> "That, in substance, is the idea."

In Appellant's brief, before the Court of Appeals, it is stated:

> "The claimant had a right to present his full claim and to press it before the Secretary. He had a right to have the Secretary consider each and every element and item; but he had no right to impose his own, *or a court's construction* or conclusion as to what the Secretary should or should not do. It was for the Secretary to determine what elements should figure in the solution of the equation, *and so long as he gave everyone the operation of the same formula,* he was neither arbitrary nor capricious in his conduct or judgment so as to justify judicial interference."

It is evident that the Court of Appeals understood the situation as did the trial court; otherwise, the late Chief Justice would not have made the positive statements in his opinion, to wit:

> "With respect to these facts, there is no dispute between the parties."
>
> Tr. p. 16, Fol. 18.
>
> "What we have said meets another contention made by the Secretary, viz.: that in rendering his decision construing the statute he was exercising his judgment, and that, as there is some basis for that judgment in the statute, the courts have no power to control his action. While this doctrine is sound where the Secretary takes jurisdiction and then exerts his judgment over the matter to which the jurisdiction extends, *it does not apply where he refuses to act, on the assumption that he has no power or jurisdiction over the subject matter.*"
>
> Tr. p. 18, Fol. 21.
>
> "The Secretary, as we have said, *did not go into the merits of the matter at all, but simply refused to take it, on the ground that he was not authorized to do so.*"
>
> Tr. p. 19, Fol. 22.

While the return is not aptly worded to express what was intended, its purpose and effect was fairly stated by Counsel, both to the trial court and to the Court of Appeals, and we do not wish to be understood as in the slightest way reflecting upon his integrity or good faith, and we have not the slightest doubt but that, had he been permitted to present this case in this court, he would have stated the situation as it really is.

The trouble is that in this court other Counsel appeared for Plaintiff in Error, who had not the personal knowledge of the situation as had former Counsel, and only had the record to guide them in their presentation

of the cause. Inasmuch as the record, at first blush, apparently sustains the position taken, we do not wish to be understood as casting any reflection whatever, as we regard all the gentlemen highly and know that they acted in the best of good faith and with the highest of purposes and presented the case as they understood it.

Even so, these purely fortuitous circumstances should not be permitted to work a hardship on the Defendant in Error and the many claimants whose rights are dependent on the decision in this case.

Because of the situation this court has misconceived not only the purpose of the petition but the legal effect of the return as well. The result is, a theory wholly different from that understood by the lower courts.

The law says that a plea in bar must be consistent with the case made and admitted, to which it is directed.

How can there be any consistency where the alleged defense repudiates express averments and incontrovertible admissions? How can this court permit a mere ipse dixit in a return to defeat an admitted Government record? How can it attribute a legal discretion to the averments relied upon, when the admissions legally preclude any discretion whatever?

The alleged return does not plead a defense of discretion exercised on the merits of the loss claimed, because the rulings themselves establish the contrary and they cannot be denied.

The return is ambiguous in that it might appear from one part of the return that the Secretary did consider the facts, whereas, if the return is taken as a whole with its admissions, it concedes that the Secretary did not consider the facts of this item of loss, but denied it solely because he held, as a matter of law, that such item of loss is not payable under the statute.

It is not conceivable that the Secretary could have

intended any other effect; therefore, it is but fair to the Secretary that his return be limited to its legal effect, to wit: a discretion exercised on a matter of law.

The thing that must be preserved intact is the rulings ; all else must give way.

The record eliminates the possibility of a discretion exercised on the merits,—hence, undermines the very foundation of the opinion of this court.

This brings this case to the theory of the petition, conceded in the lower courts as good and in this court by the learned Solicitor General on page 6 of his brief.

Prima facie, the judgment of this court is erroneous and a re-hearing should be granted.[1]

But, while admissions of learned counsel are entitled to great respect, we recognize the rule that the interpretation of a statute is not declared by admissions, but can only be legally declared by the courts after full consideration; therefore, we proceed with the argument that this court may be convinced that the trial court correctly interpreted the Act.

We have not attempted, under this heading, to consider the alleged discretion asserted on a matter of law. This question will now be considered.

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[1] *I. C. Comm.* vs. *Humboldt Steamship Co.*, 224 U. S. 474-484.
Louisville Cement Co. vs. *I. C. Comm.*, 246 U. S. 638.
Kansas City Southern R. R. Co. vs. *I. C. Comm.*, 252 U. S. 178.

III.

Congress Has No Power to Delegate to An Executive Officer, or to Any Other Inferior Tribunal, the Exclusive Right and Duty of Interpreting An Act of the Congress of the United States and to Make Such Interpretation "Conclusive and Final," and, Even Though Erroneous, Not Subject to Review By the Courts of the United States.

The basic facts being now established, the question is squarely presented as to whether the Secretary's discretion extends to matters of law.

The contention of Plaintiff in Error is and has always been that, *as an abstract legal proposition,* the Act conferred upon the Secretary the absolute power and duty to construe the Act and determine, as a matter of law, what elements of loss should be considered as a part of the net losses which Congress directed him to adjust and allow; that his construction as to what elements of loss he would or would not consider was and is "conclusive and final," and that even though he be wrong in his construction of the Act (unintentionally, of course), yet his construction cannot be corrected by any court and the claimant must remain the victim of his losses, suffered in good faith for and at the direct request of his Government.

In our humble opinion, this is not and cannot be the law. If wrong, it can never be just and equitable. It is UN-AMERICAN, and it is in direct conflict not only with the express provisions of the Act itself, but with the Constitution of the United States.

The Constitution vests—

> "The judicial power of the United States in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

What is a judicial power? In *Marbury* vs. *Madison*, Chief Justice Marshall said:

> "It is of the very essence of judicial duty for the courts to say what the law is, and that in a particular case to which both the law and the Constitution apply, the Courts must regard the Constitution as superior to any Act of the Legislature and decide the case conformably to the Constitution, disregarding the law."
>
> "The judicial department of every government is the rightful expositor of its laws. It is the duty of this department to declare the meaning of the law as enacted by the legislature and not to make, modify, amend or insert exceptions in a statute."
>
> Vol. 11, Ency., U. S. Rep., p. 109;
> *Bank* vs. *Dudley*, 2 Peters, 492; 7 L. E., 496;
> *U. S.* vs. *Fisher*, 2 Cranch, 358; 2 L. E., 304;
> *U. S.* vs. *Temple*, 105 U. S., 97; 26 L. E., 967;
> *Whitney* vs. *Robertson*, 124 U. S., 190; 31 L. E., 386;
> *Lake Co.* vs. *Rollins*, 130 U. S., 662; 32 L. E., 1060;
> *U. S.* vs. *Jones*, 131 U. S. 1; 33 L. E., 90.
> *Dewey* vs. *U. S.*, 178 U. S., 510; 44 L. E., 1170;
> *White* vs. *U. S.*, 191 U. S., 545; 48 L. E., 295.
>
> "Our province is construction only; the policy of the law is the prerogative of the legislative department."
>
> *U. S.* vs. *Jones*, 131; U. S. 1; 33 L. E., 90.

This court has repeatedly decided that the judicial power referred to in the Constitution covers every legis-

lative Act by Congress, whether it be made within the limits of its delegated powers, or by an assumption of power beyond the grants in the Constitution.

Ableman vs. *Booth*, 21 Howard, 520;
Powell vs. *Pa.*, 127 U. S., 686;
Gordon vs. *U. S.*, 117 U. S., 705;
Cooper vs. *Telfair*, 4 Dall., 14;
Chicago vs. *Wellman*, 143 U. S., 345;
Close vs. *Glenwood Cemetery*, 107 U. S., 475;
U. S. vs. *Harris*, 106 U. S., 635;
The Trade Mark Cases, 100 U. S., 96;
Hylton vs. *U. S.*, 3 Dall., 175.

Mr. Justice Story said:

> *"The Constitution imposes upon the judicial department the solemn duty of interpreting the laws; and, however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."*

U. S. vs. *Dickson*, 15 Peters, 141; 10 L. E., 689;
Muskrat vs. *U. S.*, 219 U. S., 346.

This court has decided in numerous cases that Congress cannot assume judicial powers, except in the cases specifically enumerated in the Constitution, nor can it delegate any such power to an executive officer.

Kilbourne vs. *Thompson*, 103 U. S., 168;
Andrews vs. *Hovey*, 124 U. S., 717;
Prigg vs. *Pa.*, 16 Peters, 539;
Angle vs. *Chicago R. R. Co.*, 151 U. S., 20;
Ableman vs. *Booth*, 21 Howard, 506.

There is no such thing known to the law as the discretionary interpretation or construction of a statute. Certainly, the Decatur case does not so hold.

The purpose of interpretation or construction is to declare the intent of Congress, and in the determination of this judicial power, there is no discretion.

Courts do not construe or interpret statutes and declare the law because of a discretion that permits them to do so,—courts declare the law because it *is* the law as enacted by Congress.

Once declared, its administration may require the exercise of judgment and discretion, and this is the only discretion that can be lawfully exercised by an administrative officer.

The sole question now under consideration is not what may be or has been done by an executive officer under a statute, but whether Congress can pass a law delegating exclusive and final right and authority to an executive officer, discretionary or otherwise, to interpret an Act of Congress and declare the law and thereby deny to the Federal Courts the right to review and correct that interpretation, though it be erroneous.

If the decisions of Chief Justice Marshall and Mr. Justice Story are still the law, then the interpretation or construction of an Act of Congress involves the exercise of judicial power within the meaning of the Constitution, and it is not only the right but the duty of this court to interpret this Act and declare he law, tell the Secretary what Congress intended he should do and direct him to do it, under the court's interpretation of the law, *but not to control his discretion in the doing.*

There is still another and complete answer to this alleged right of discretionary construction and that is: *the Act does not confer any such power or authority.* The basis of the Secretary's contention is undoubtedly the first clause of the second paragraph of the Act and results from a misunderstanding of its purpose in the Act. As it will be necessary to consider this clause

later, it will avoid repetition if the court will reserve consideration of this point.[1]

Thus, we have established four propositions, and, so to speak, cleared the decks for consideration of this case as it really is, viz.:

(1) The legislative history does not support the conclusion of the Secretary nor the opinion of this court.

(2) The answer raises no issue as to a discretion exercised in adjusting the loss claimed; in short, this particular loss was not and has never been considered on its merits by any Secretary.

(3) That the interpretation or construction of a statute enacted by the Congress of the United States and declaring the law therefrom, is the exercise of a judicial power and that this power belongs exclusively to Federal Courts and cannot be delegated.

(4) As a necessary conclusion, we submit that we have established beyond further discussion that, under the Constitution, it is both the right and the duty of Federal Courts to interpret or construe the Acts of Congress and declare the law, *reserving, however, as in the Mozier case,* all proper discretion to any officer or tribunal committed to its administration respecting questions of controverted fact; in other words, declare the intent of Congress, and then direct its administration accordingly, *but not to control any legal discretion necessary to its administration.*

We are already alarmed at the length of this petition and will not attempt to distinguish the Decatur case and other cases cited in the opinion, nor further discuss the alleged right of discretionary construction other than to say that, that case is different in theory and is readily distinguishable from the case made by the petition and is answered in the opinion of the Court of Appeals.

Tr. p. 18, Fol. 21.

[1] Pages 53-59, inclusive.

We now come to a consideration of the real question presented by the record. Resolved to an abstract question, it is:

IV.

Are Losses Suffered on Purchase of Real Property By Reason of Preparing to Produce Manganese At the Request of the Department of the Interior, a Part of the Net Losses Which Congress Has Directed the Secretary to Consider and Adjust?

All requirements and conditions under the Acts must be conceded, because admitted by the pleadings.

We are confronted with this anomalous situation,—a verified petition alleging every essential fact under the Acts demanding consideration by the Secretary of this particular item of loss and an adjustment *"in the light of the facts,"* yet the Secretary, conceding non-action and refusal to act, denies the loss.

We again pause to make our position clear and to correct a misconception in the opinion of this court.

The opinion says that mandamus is sought to compel the Secretary *"to consider and allow."*

We respectfully submit that a careful analysis of the petition will disclose that its purpose is *not* to compel the Secretary *to allow* the amount alleged to have been suffered as loss, but to compel him to consider it as a part of the claim,—as any other item, to hear evidence respecting it and then, "in the light of the facts" and within a just discretion, determine and declare such loss, *if any.*

It is not sought to compel the Secretary to arbitrarily allow the amount claimed as "a loss for property." The record discloses that Defendant in Error is not entitled to that sum, as it is not even known whether the item claimed was for speculative purposes or not. One purpose of the writ is to compel the Secretary to make a finding of fact on the proviso imposing this condition.

The purpose of the petition is to compel the Secretary to take jurisdiction of this particular item of loss and adjust it on its merits, make findings of fact and conclusions of law and justly declare the net loss, *if any.*

The real purpose is to compel the Secretary to exercise his discretion on the facts and relieve Defendant in Error from a hard and fast rule applicable in all cases as a matter of law.

The petition was not brought to control the discretionary powers of the Secretary on questions of fact after conceding jurisdiction but was brought to compel him to take jurisdiction, hear the facts and then exercise his discretion.

Thus, we are brought to the interpretation of the Act as an abstract question;—to determine whether or not losses for the purchase of real property are a part of the net losses that Congress has directed the Secretary to adjust.

The enacting clause is found in the first paragraph of the Act. It declares the intent of Congress and discloses the object of the Act. It expresses the intent of Congress in language so simple and direct that he who reads must understand. There is no ambiguity whatever. Respecting this enacting clause, the learned Court of Appeals said: "There is no ambiguity."

The language of Mr. Justice Harlan, in *Dewey* vs. *U. S.*, fits this case. He said:

> "Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as, in effect, to adjudge that to be the law which Congress has not enacted as such. *Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed.*"
> 178 U. S. 510; 44 L. E. 1170.

The original Henderson Amendment passed by the Senate and sustained by the Senate on report of its conferees, contained an enumeration of the items of loss that should be considered by the Secretary and upon which he should exercise a just discretion on the facts. "Expressio unius est exclusio alterius."

An examination of the Act finally passed by Congress and upon which this case depends, discloses that *all of these enumerated items of loss are included,* as expressed by Mr. Wingo to the House, in an *"omnibus clause."* "Omne majus continet in se minus."

The enacting clause is general in its language and objects. It involves no absurdity or contradiction; consequently there is no room for construction. It must be interpreted according to the natural import of the words used. To give it any other meaning or effect is executive or judicial legislation, hence an infringement on powers which the Constitution confers exclusively upon Congress.

The object of the Act and the intent of Congress is so apparent that it is hardly a subject for discussion.

The object of the Act and the intent of Congress being

apparent, the next step is to ascertain how or in what manner "net losses" shall be ascertained and declared. Shall it be by the arbitrary decision of the Secretary as a matter of law, or upon the merits of each element of loss claimed as a matter of fact?

What reason is there for distinction between an item of loss suffered on account of purchase of real property from any of the other items of loss suffered in the same manner and for the same purpose?

Why distinguish such loss from pay-roll, supplies, road-building, hauling, loading, boarding-house expenses, office expenses, travelling expenses, etc.? These losses have been ascertained and allowed in this claim under this general statute and there is nothing to indicate their allowance and the disallowance of real property losses.

We submit that the true rule and the only sane and reasonable rule is that the proof and the investigations made must establish to the Secretary's satisfaction that the particular item of loss claimed was suffered in good faith *by reason of* preparing to produce at the Government's request, and that it was fair, necessary and reasonable.

If it was fair, necessary and reasonable, and it resulted in a loss in preparing to produce because of the Government's request, why reject it? Will that carry out the will of Congress?

To prevent the payment of losses to prospectors or to foolish operators or investors, a proviso was added that *before* a *"claim"* could be allowed by the Secretary, it should be established to his satisfaction that—

> "the expenditures so made or obligations so incurred by the claimant were made in good faith *for or upon property* which contained * * * manganese * * * in sufficient quantities to be of commercial importance."

Here again, we submit, is plain, direct language containing no ambiguity whatever. It can, in common sense, refer only to expenditures or obligations in good faith for or upon commercially important properties, and not to "holes in the ground." This proviso is, we submit, an express recognition by Congress that the "net losses" in the enacting clause includes losses for the purchase of the mine itself, provided the mine meets the conditions of the proviso.

Plaintiff in Error contends that the word *"for"* means for the benefit of, and the word *"upon"* means literally within the four corners of the property; hence, "for property" does not mean for the property itself; therefore, the words do not *impliedly or expressly* recognize losses for property as an element of the "net losses" which Congress has directed must be adjusted and, consequently, are not in conflict with the alleged legislative history relied upon.

It is elementary that statutes must be interpreted in accordance with the ordinary rules of grammar.

Two words in a phrase separated by the disjunctive "or." Therefore, the word "for" has as much meaning and importance as the word "upon," and the one is not a limitation or qualification of the other. Diagram the sentence containing this phrase, and the question is settled.

It should be remembered at all times that this legislation was enacted by Congress in relation to mining rights and to pay the losses of mining men, and that its language was employed for that purpose.

The words "on" and "upon" have been repeatedly construed by many courts in relation to mining rights, and it has never been held by any court in relation to mining rights that either word means literally within the four corners of the property. In construing these words in Federal statutes relating to assessment work and patents for mining property, the requirements as to the doing of

certain work "on" or "upon" property are not confined to work done literally within its four corners, but that any work done *for* its benefit, though not literally within the four corners of the property, is done "on" and "upon" the property. This, we submit, is the customary and reasonable interpretation in a mining sense, of the words "upon property." It has the approval of authority.

> "The rule is well settled that work done outside a claim or group of claims, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims as if done within the boundaries. One general system may be formed, well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system, whether done within or without the claim or claims, is work done *on* the claims intended to be developed."
>
> 2 Lindley on Mines (3d Ed.), Sec. 631, p. 1559.
> Copper Glance Lode, 29, Dept. of Int., Dec., 543, 548.

The meaning of the words "upon property" is now understood by every prospector and every miner in the hills. It is so well known and now so firmly established in relation to mining, that it would be iniquitous to upset it at this late hour. Vested rights have been established and are now asserted and maintained upon the meaning declared by the courts as herein set forth,—in short, by long established acceptance and custom, it has now become a rule of property.

If, therefore, these words, with the meaning declared and approved by prior judicial interpretation, are again used in a statute, they must be understood in the same sense. Failing to heed this rule and enforcing the Secretary's meaning instead of the meaning which the law

says Congress is presumed to have intended, is nothing more nor less than a change in the law,—a modification by executive construction.

> "Where the same or like terms, the meaning of which in a prior statute has been ascertained by judicial interpretation, are used in a subsequent statute, *they are to be understood in the same sense, unless the intention to use them in a different sense clearly appears.*"
>
> 11 Ency., U. S. Rep., 137, note 23.

There is nothing in the Act, or in the language of this proviso, that indicates the slightest intention to use these words in a different sense from that established by prior judicial interpretation. Other provisos, which we will consider indicate clearly, if not conclusively, that Congress understood the meaning of the words "upon property," as judicially interpreted, and that it intended just such meaning in this Act.

If in prior statutes the words "upon property" have been interpreted to mean for the benefit of property, necessarily "for property" cannot mean the same thing. It must have some meaning of its own, otherwise it serves no purpose in the Act. If it does not mean for the purchase of the property itself, it is meaningless. *The law, by its interpretation of the words—"upon property"—reads into the Act everything that Plaintiff in Error ascribes to the phrase "for or upon property."*

The operation or effect of a proviso in a statute following an enacting clause, general in its language, seems never to have been understood or known to Plaintiff in Error.

The scope and effect of such a proviso is settled in the law. This court has declared the rule:

> "The object of the Act of 1818 manifestly is to provide a suitable compensation for the receivers and registers of public moneys for the public lands. * * * We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."
>
> *U. S.* vs. *Dickson*, 15 Peters, 141; 10 L. E., 689.

Such a proviso does not take away any right granted by the enacting clause, unless the purpose to do so is clear and unmistakable. A proviso is strictly construed and only limits, or takes out of the operation of a general enacting clause, that which is clearly intended. Where, in this Act, is there anything that indicates such purpose?

The contention of Plaintiff in Error is by *implication* only and results from a strained, unnatural and ungrammatical interpretation of the phrase, "for or upon property," and a total misapprehension of the purpose of the proviso in the Act. It prevents a harmonious interpretation with the enacting clause and other provisos in the Act, whereas the interpretation put on this phrase by the Court of Appeals permits a harmonious interpretation of and gives force and effect to *all* the language in the Act.

Inasmuch as there has always been a misapprehension of the purpose and effect of this proviso, we deem it necessary to direct the court's attention to its true and legal purpose.

It is the first proviso and the most important in the Act and reads as follows:

> *"That no claim shall be allowed or paid* by said Secretary *unless* it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith, for or upon property which contained either manganese, chrome, pyrites or tungsten, in sufficient quantities to be of commercial importance."

This proviso means exactly what it states. It's purpose in the Act is obvious. *Like all other provisos in the Act, it is a limitation upon the claim itself.* It does not purport to be and never was intended as a modification of "net losses" in the enacting clause. It is not possible legally to interpret this proviso so that it clearly takes anything out of the enacting clause. If it be done, it will be by implication only, and this brings it within the inhibition of the rule announced by Mr. Justice Story, in *U. S.* vs. *Dickson.*

This proviso is nothing more nor less than a *condition precedent* which must be satisfied before a claim can be adjusted by the Secretary. In other words, when a claim is presented for consideration, the *first duty* of the Secretary is to ascertain to his satisfaction, either that the expenditures made by the claimant or the obligations incurred by the claimant, included in the claim to be adjusted, were made by him in good faith, either for property or upon property or for or upon property, which contained one of the specified minerals in sufficient quantities to be of commercial importance.

The right of a claimant, under this proviso, to have his claim adjusted and paid, is *in the alternative.* The condition of the proviso is satisfied if an expenditure was made in good faith upon property. It is likewise satisfied

if the expenditure was made for property, and it is likewise satisfied if the expenditure was made for or upon property. Claimants would have the same rights if no expenditures were made but their claims consisted only of obligations incurred in good faith either for or upon property. Here, the alternative ends.

All properties to which these alternative rights extend, must contain one of the minerals specified in sufficient quantities to be of commercial importance. This proviso does away with Mark Twain's definition of a mine.

This proviso is sufficient unto itself. It has no relation to the "net losses," or to any element of the "net losses" to be determined. *Once the Secrtary is satisfied* that either the expenditures made or the obligations incurred, were made or were incurred as required by its terms, it has served its purpose in the Act.

The reason for the alternative was to permit the Secretary to pay "net losses" if they consisted merely of expenditures made or merely of obligations incurred, and to pay them if they were so made or were so incurred either for property or upon property. It is perfectly apparent that Congress covered the entire scope of conditions that might exist and endeavored to make this proviso inclusive of all possible conditions so as not to defeat the general purpose declared in the enacting clause. The proviso does not require that the expenditures or the obligations should be both for the property and upon the property. "Expenditures and obligations," and "for and upon," are disjoined by the disjunctive "or," therefore each word must be afforded a meaning independent of the other.

When Congress inserted this language in the proviso, it had in mind the facts of one claim, at least, in which the total net loss to be claimed was solely and only an

expenditure made for the purchase of a mine in good faith by reason of the personal request of the Secretary of the Interior.

Claim of Thomas Thorkildsen, No. 979.

Once the Secretary determines that the claim satisfies the conditions precedent required by this proviso, he is authorized to proceed with the adjustment of the "net losses," as directed in the enacting clause, without further limitation or restriction save as may be necessary in other provisos.

In the case at bar, the conditions required by this proviso have been satisfied and it so appears in the record. Defendant in Error made expenditures upon property and for property containing manganese in sufficient quantities to be of commercial importance, and the Secretary has paid a part of the expenditures so made. The demands of the proviso are satisfied and the Secretary was authorized to proceed with the adjustment, as required by the enacting clause. Being so, the proviso served its purpose; it is *functus officio*, and has no further application.

If there is any inference to be drawn from the language used in this proviso, it is that Congress has impliedly recognized that the "net losses" declared in the enacting clause includes either expenditures or obligations for property, to wit: for the purchase of the mine. As a matter of law, this inference is permissible as it does not take anything from the enacting clause and permits of a reasonable and harmonious interpretation and application of all language, but it is not permissible to indulge in inferences which take out of the enacting clause anything otherwise within its terms.

We want to again impress the fact that it is conceded that, were it not for the "legislative history," and its alleged approval implied in this proviso, such losses would

have been considered and adjusted as a part of the "net losses" suffered.

The contention of Plaintiff in Error impliedly takes out of a general enacting clause an element of loss that would otherwise be included in it, whereas, properly interpreted, the proviso itself implies its inclusion.

We direct the court's attention to another proviso, to wit:

> "*That no claim shall be paid unless* it shall appear to the satisfaction of said Secretary * * * that no investment for merely speculative purposes shall be recognized in any manner by the said Secretary."

This proviso, we submit, is but another condition precedent and was inserted for one purpose only—to limit losses suffered for the purchase of real property to those claimants who had no speculative purpose in mind and had only a purpose and intent of producing for the benefit of the Government. It was inserted to emphasize the fact that Congress did not wish to pay "speculators," even though they dealt in commercially important properties. Once it be determined that the loss claimed was *not* for "speculative purposes," this proviso has served its purpose and the Secretary is authorized to proceed with the adjustment of such loss.

We are not able to imagine any case where an investment can be made for "merely speculative purposes" in a mining operation which does not relate to the property itself. It cannot within reason apply to pay-roll, road-building, and actual operations and incidents necessary for production. A diagnosis by process of elimination brings us to but one possible element—to wit: for the mine itself.

What is an investment? Webster defines it as "The

laying out of money in the purchase of some species of property, especially a source of income or profit."

This proviso must mean something and it must have been inserted for a purpose. If it is not a limitation on losses "for property," *i. e.*, the mine itself,—to what species of property can it refer as an "investment"? It cannot possibly refer to any other element in the operation of a mining property going to make up a net loss in a trial balance. It can only refer to that which is customary and reasonable and conforms with other language in the Act.

If a claimant buy one hundred tons of explosives for an operation where the evidence showed that ten tons was all that could possibly have been required, obviously a loss suffered on the ninety tons could not be allowed as, manifestly, it would not be a loss suffered by the claimant *"by reason of preparing to produce."* Such a loss would be nothing more nor less than a loss suffered by reason of bad judgment. The Secretary has denied losses suffered by claimants in the driving of tunnels and in the sinking of shafts where investigation by Government engineers and others has established to his satisfaction that the driving of the tunnel, or the sinking of the shaft, was unnecessary and unreasonable and such as no reasonably prudent man should or would have undertaken. We give this illustration to demonstrate that such losses are covered by the enacting clause and that it was not necessary for Congress to add a proviso in order to protect the Government against such items of loss.

The proviso has no meaning or application unless it refers to an investment, to wit: the purchase of the mine itself. If the language of this proviso be not given the meaning and effect it so obviously demands, it is useless in the Act and serves no purpose. If it does not refer

exclusively to investments "for property," it is not in accord with any mining custom.

We direct attention to the last proviso in the Act, which includes the phrase, "to equip said mine." Of course, this recognizes the obvious, because no loss could be claimed unless claimant operated a mine; but it is equally obvious that Congress again recognized that before a claimant could commence production at the request of the Government, it would be necessary for him lawfully to have a mine. Mines can only be acquired in one of several ways:

(1) It may have been owned by the claimant prior to the request;
(2) It may have been acquired by location on public lands;
(3) It may have been acquired by lease;
(4) It may have been acquired by gift;
(5) If not in these ways, then, by purchase.

If the Secretary would permit, this claimant could and would prove that at the time of request by the Government, he had no property of commercial importance containing the mineral requested to be produced, that it was necessary for him to acquire such a property, that he could not acquire same by location on public lands or by lease,—nor would anyone give him such a property;—that the only way he could acquire such a property was by purchase at a reasonable price and that he did, therefore, purchase such a property and that he did so solely and only because of such request and not otherwise, and, what is more important, that such facts were known to Congress before the Act was passed.

Is it not too clear for argument that his expenditure or obligation incurred for the property, was an expenditure

made or obligation incurred by him *"by reason* of preparing to produce" at the request of the Government? Acquiring a property is the first step necessary to enable such a claimant to respond to his Government's request, and how it can be claimed by any reasonable mind that it was not incurred *"by reason"* of preparing to produce, is beyond our comprehension.

The enacting clause includes every item of expenditure and every obligation incurred by the claimant in good faith *"by reason of"* preparing to produce. Once the conditions of the provisos are satisfied, all losses claimed must be considered by the Secretary and allowed or rejected on the facts in each case. This is expressly admitted by Plaintiff in Error in his brief before the Court of Appeals (ante);[1] otherwise, the "net losses" which Congress has directed to be adjusted and paid, will not be adjusted and paid and the Secretary will have failed to perform a duty which the Act imposes upon him.

The true meaning and application of the several provisos in the Act impliedly reveal a clear intent of Congress that the Secretary should consider, adjust and allow, all losses suffered "in good faith" by the claimant, by reason of purchase or lease of property in preparing to produce at the request of the Government, as no proviso takes from the enacting clause any item going to make up the "net losses" which the Secretary is authorized to consider and adjust.

The provisos are not, as we understand the contention of Plaintiff in Error, the basis of his position, but are adverted to and relied upon incidentally as supporting same.

Plaintiff in Error relies upon the first clause of the second paragraph of the Act, to wit:

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[1] Page 27.

> "The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable."

He contends that this language in the Act invests him with an absolute and arbitrary power to construe the statute as he shall determine to be just and equitable, *a fortiori,* as justifying the rejection or allowance of any item of loss as he shall likewise determine, irrespective of the facts.

Aside from the fact that Congress has no right to confer such a power (ante), the fallacy of this contention lies in the fact that Congress did not intend this language to have any such meaning or effect,—that it was inserted for an entirely different purpose. The contention of Plaintiff in Error respecting this clause of the Act follows, because he has not inquired into and does not know the true history or reason for its insertion in the Act.

The contention is erroneous because, given the force and effect contended for, it amounts to a repeal of the enacting clause.

First, let us consider the history and the purpose of this clause.

When Mr. Wingo completed the first paragraph, he announced to the Committee, and later to Congress, that this paragraph enabled the Secretary to consider every item of loss claimed as resulting from Government demand, without limitation of any kind whatever.

At the time this legislation was pending in Congress, there appeared before both the Senate and the House Mines Committee, Mr. George L. Pratt, of Atlanta, Ga., one of the two owners of the Chestatee Pyrites and Chemical Company, claimant No. 1, under the Act, and Defendant in Error in Case No. 401, recently decided by this court.

To both committees and to the Secretary of the Interior, it was known and conceded that Mr. Pratt and his brother had borrowed a large sum of money, to wit: nearly $700,000, at the direct demand of the Secretary of the Interior, for the purpose of increasing the production of pyrites at their mine; that the loan was arranged by the Secretary of the Interior and was used for the purpose intended; that, after the Armistice, there was no market for pyrites; that their property with its increased capacity, due solely to direct demand made upon them at Washington by the Secretary of the Interior, was practically worthless; that all the stock owned by Mr. Pratt and his brother in the Chestatee Company was pledged, as collateral security, for a loan, which was used by them in the development of the property, as aforesaid; that the loan was overdue and that foreclosure of the stock held as security had been threatened and was about to be enforced and that, if enforced, Mr. Pratt and his brother would lose, *for a nominal amount,* their ownership of the entire issue of stock in the Chestatee Company; that both he and his brother would thereby lose not only their investment, but their entire personal fortune and would be reduced to bankruptcy and that the persons who would thus acquire their stock by foreclosure would, in fact, reap the benefit of any award made to the Chestatee Company, it being conceded by everybody—including the Secretary of the Interior—that the Chestatee Company was entitled to a very substantial award; and, in this behalf, it is a matter of record that Secretary Lane requested Senator Henderson to be sure to include in the appropriation to be made by Congress, the sum of one million dollars, to enable him to pay the claim of the Chestatee Company, as that was one of the claims for which he was personally responsible.

These facts were known and understood by Secretary Lane and Mr. Wingo. Therefore, when he had completed the enacting paragraph, taking care of *all losses*, they directed that the next provision be a clause that would enable the Secretary to make *a payment on account* to the Chestatee Company, as soon as he could ascertain that an amount certain was justly due that Company, without waiting for a full and final determination of the claim, which all then recognized would require a considerable period of time.

Accordingly, the first clause of the second paragraph was prepared to read in substance as follows:

> "The said Secretary shall make payments on account to claimants from time to time, as he shall determine to be just and proper."

The Act, when completed by Mr. Wingo, containing the above, was submitted to Secretary Lane for approval.

Secretary Lane gave his approval to the proposed substitute measure with but one suggestion, and that was a change from the language submitted by Mr. Wingo to the following:

> "The said Secretary shall make such adjustments and payments as he shall determine to be just and equitable."

Secretary Lane explained that this language would enable him to accomplish the same purpose and would likely bring less criticism in debate in the House. The suggestion was not entirely satisfactory to Mr. Wingo and, in order to clarify the matter and make it certain that the paragraph meant what was intended, he added the words —"*in each case,*" and, as thus modified, it was accepted, submitted to the House Committee and approved.

We have submitted the true meaning and the purpose of this clause and exactly what we can prove to the Secretary, if given the opportunity.

If it means anything else, it is void. If this clause confers such a power as contended for by Plaintiff in Error, it is repugnant to the enacting clause which so clearly expresses the object of the Act and the intent of Congress. If the contention of Plaintiff in Error be correct, then the enacting clause might as well have been omitted from the Act. If the contention be sound, then Congress has not directed the Secretary to pay the net losses suffered *by reason of* preparing to produce, etc., but *only* such net losses as the Secretary shall determine to be just and equitable.

Such a construction is impossible, because Congress has not the power to pass such a law. The Constitution gives Congress the power and authority to pay the debts of the nation. Under such power, it is necessary for Congress to ascertain and declare, or classify within reasonable limits at least, what the debts are that should be paid and not to leave such determination to the discretion of any executive officer. If the Secretary has the power under this Act to determine arbitrarily what losses shall be paid, then Congress has conferred a power that belongs to Congress, and it is settled that powers belonging to any of the constitutional divisions of our Government cannot be delegated to any other authority. Furthermore, Congress cannot pay the debts of the nation in any such vague and indefinite form. The funds of the Government cannot be made subject to the use of any executive officer for a purpose deemed by him to be just and equitable. So far as we are able to ascertain, it has never been done, and impliedly to assume such a delegation of power is an undeserved reflection upon Congress.

The debt to be paid and its limits must be declared by Congress. We do not question that, in carrying out the intent of Congress, the executive may, upon the facts, exercise a just discretion in arriving at the result, but it is not permissible for the executive to determine what debts should be paid or prescribe any limitations. That is a power belonging exclusively to Congress.

Furthermore, the elementary rules of interpretation of statutes require that effect be given to all language in a statute and reconcile every part of the statute.

As we have said, if this clause means that the Secretary shall make only such payments in each case as he shall determine to be just and equitable, then the enacting clause has no meaning whatever and may as well have been omitted.

The words—"just and equitable"—in this clause, add nothing to the Act not already included as a matter of law in the enacting clause. This is concededly remedial legislation, and this court has repeatedly declared that remedial legislation demands liberal interpretation and just and equitable administration in order to carry out the intent of Congress. Therefore, the words—"just and equitable"—are, as a matter of law, read into the enacting clause. In this clause, they add nothing whatever to the Act and serve no purpose, unless it refers to payments on account.

Congress did not intend that the Secretary should be compelled to make payments on account of every claimant as a matter of right, but it did recognize that there were cases in which a payment on account might be necessary. Therefore, Congress gave the Secretary the power to determine just how many adjustments and how many payments he would make, *in each case.* Obviously, if the Secretary be required to make payment on

account to every claimant, as a matter of right, great confusion would exist and the Secretary be subjected to unreasonable requests and demands, thus causing unnecessary confusion and a multiplicity of work and an added expense to the Government in the administration of the Act and, what is more important, the possible defeat of a payment on account to some claimant really entitled to such payment under the Secretary's discretion.

The words—"just and equitable"—in this clause, were not intended to and do not, in fact, add anything to the power and authority of the Secretary as to the merits of any particular item of loss claimed. Everything that these words express or imply is conferred upon the Secretary as a matter of law by the first paragraph. In other words, if this clause had been omitted entirely (this being a remedial measure), the law itself gives and requires a just and equitable administration of the Act. Therefore, it is meaningless as to the merits of the losses suffered, but is full of meaning and significance respecting payments on account.

This clause does not and cannot confer a power of final interpretation or construction of the Act on the Secretary, —if it does, it is unconstitutional and void.

It is apparent that its real purpose in the Act has not been understood by the Secretary, as his interpretation amounts to a repeal of the enacting clause and prevents a harmonious interpretation of all language in the Act. Therefore, we assert with confidence, that its true purpose is as we have stated, because it is the only possible meaning that will avoid repugnancy, conflict with the Constitution and permit of a harmonious interpretation of all provisions of the Act.

V.

"Conclusive and Final" Proviso Settles Decisions on Facts, But Not of Law. It's Meaning Is Settled By Prior Judicial Interpretation.

The only difficulty with the position taken by Plaintiff in Error respecting this proviso is that he misconceives its purpose in the Act, and, instead of limiting its application to a just and equitable determination on the facts, he insists upon its application to matters of law as well, to wit: to his construction of the Act.

Irrespective of what we have said of the power of Congress to delegate to an executive officer a judicial power belonging to this court, there are other and complete answers to this contention, which a little diligence on his part would have revealed.

The use of the words, "conclusive and final," in an administrative statute is not uncommon. The exact phrase has been judicially interpreted and its purpose and meaning declared by this and other courts. In every case, its application has been limited to a determination on questions of fact and with this we have no quarrel as we concede that any decision on the facts, not fraudulent, arbitrary or capricious, is "conclusive and final" and not subject to review in any manner.

We know of no case in which these words have ever been held to apply to questions of law, and as none have been cited by Plaintiff in Error, we may safely conclude there are none.

The purpose of this proviso is obvious. The Dent-Chamberlain Act was a bill of great magnitude. Congress feared that a great mass of litigation would result from its administration and that this litigation would clog

the Federal courts. In order to relieve the courts, as far as possible, Congress purposely made the Secretary's decision on the facts "conclusive and final," and denied claimants the right to resort to the courts to settle controverted facts. This was a sensible thing to do and was as far as Congress could go.

How can any decision be "conclusive and final" on the facts, when the Secretary refuses to hear the facts?

But Plaintiff in Error goes further and boldly asserts that Congress has made his construction of the Act, right or wrong," conclusive and final." If right, of course, it is "conclusive and final," but, if wrong——?

The fallacy of this contention appears from what we have said respecting the jurisdiction of the constitutional divisions of our Government. It may be summarized by a quotation from a standard authority:

> "The legislature cannot authoritatively declare what the law is or has been,—that is a judicial function and appertains to the courts."
> Sutherland Stat. Const., 2d ed., Sec. 357, p. 683.

If Congress has no such power, how can it delegate a right and authority over which it has no control?

However that may be, another answer to this contention is that these words have had prior judicial interpretation and, under the rule announced by this court (ante), that, when used in a subsequent statute, it will be presumed that they are used in the sense declared by prior decisions; therefore, in this Act, these words must be understood in the same sense. The meaning and purpose of the phrase is declared and settled.

> *Lane* vs. *Mickadiet*, 241 U. S., 201;
> *Grubnau* vs. *U. S.*, 176 Fed., 904;
> *Rush* vs. *Allen* (Del.), 76 Atl. Rep., 370–6.

And last, but not least important, is its general use and purpose, to wit: to confer final and exclusive jurisdiction on the Secretary as to the amount of the payments and the manner of making same, in order to expedite the administration of this Act and take it out of the usual routine of the general accounting system and to overcome control or supervision by the comptroller under established practices customary in routine matters.

The court will note that this proviso immediately follows the proviso permitting the Secretary to make one or more adjustments and payments in each case.

If the Secretary determines that it is just and equitable to make several adjustments and payments to a particular claimant, then that determination is conclusive and final and binding on all alike, including the comptroller, and it cannot be held that the first adjustment and payment exhausted the Secretary's jurisdiction and brought the claim within the general rule announced in many decisions by the Comptroller and the Attorney General.

We concede that this proviso makes the Secretary's action, if just and equitable, conclusive in all discretionary matters on the facts, but it is not and cannot in law, be held to mean "conclusive and final" against the law itself.

VI.

Acceptance of Award.

This question was not considered by the court in its opinion nor relied on by the Secretary in promulgating his rulings. It is purely local to the case under consideration, and should not be permitted to defeat a right

granted by the amendment of 1921. This case is, in reality, a test case upon which the rights of many citizens depend, and we submit that the Secretary should not now be permitted to hide behind a highly technical defense resulting because of his error and the misfortune and necessity of a claimant compelled to accept the payment allowed, in order to avoid bankruptcy. It is a purely legal defense and should not be received or accepted where it will defeat equity.

Furthermore, the certificate of settlement upon which the payment was made expressly states that it is only conclusive "as to any item upon which payment is accepted."

2 Compt., Dec., p. 242.

This position is fully answered and disposed of in the opinion of the Court of Appeals.

The first award does not bar a second award, as the Act of 1921 expressly reopens all claims for consideration by the Secretary. Furthermore, the Act expressly permits of more than one adjustment and payment in each case, and, as the Secretary received and disposed of the petition under the amendment of 1921, he should not now be permitted to sustain his rulings by a reason not then relied upon. Alleged acceptance is a mere afterthought and it is too late to urge it now.

VII.

This Is Not a Suit Against the United States.

We advert to this contention merely to emphasize the purpose of the petition praying for mandamus.

Beginning with the decision of Chief Justice Marshall in *Marbury* vs. *Madison,* down to the present time, it has been repeatedly declared that:

> "The writ of mandamus is in the nature of a personal action, being aimed exclusively against an officer as a person, even where the duty is an official one, and he only can be punished for disobedience. The writ does not reach the office, nor can it be directed to it."
>
> *U. S.* vs. *Boutwell,* 17 Wall. 604; 21 L. E., 721.
>
> "The propriety of issuing a mandamus is determined not by the office of the person to whom it is directed, but by the nature of the thing to be done."
>
> *Marbury* vs. *Madison,* 1 Cranch 137.

What is the nature of the thing to be done in this case and for which the writ is issued? It is merely to compel the Secretary to proceed to a determination of the merits of this alleged item of loss and to determine it on its merits,—to investigate and declare the facts. The writ does not control this determination in the slightest degree. Its issuance in the case at bar cannot on the face of the record possibly have the result of compelling the Secretary to arbitrarily allow the amount claimed. This is not even a case of "purely fortuitous circumstances," as was the Louisville Cement Co. Case (246 U. S. 638); for in this case the Secretary has never determined and has refused Defendant in Error the privilege of offering proof as to whether the amount expended "for property" was for a speculative purpose or not.

For aught we know, the evidence may establish that no allowance should be made because the purchase was for the purpose of speculation and not in a legitimate attempt to produce;—the evidence may establish that the price paid was excessive and that a reasonably pru-

dent man could have made the purchase for five thousand dollars instead of twenty thousand dollars. The evidence may establish several reasons for its rejection; but whether these reasons exist or not is not known, as the Secretary has refused to investigate. The purpose of the writ is to compel him to do so and, on the facts established, exercise a just discretion and either reject or allow it.

This contention is not possible as a matter of law and cannot be true in fact.

VIII.

The Amendments of 1921 and 1924 Are Implied Recognitions By Congress that Legitimate Losses Suffered in the Purchase of Real Property Should Be Considered and Adjusted.

The mal-administration of the Act of 1919 brought so many complaints to Congress that a committee was appointed to investigate. The proceedings were reported and are found in H. J. 170.

As a result of these investigations, the Committee reported to Congress:

> "The Committee is of opinion that the Commission erred in its interpretation of the legislative intent, its application of the provisions of the Act, and the application of the provisions of the law to the facts."

As a result, Congress passed the Act of November 23, 1921, known as the Shortridge Amendment, which, in substance, reads as follows:

> "All claimants who in response to * * * request * * * in good faith expended money in producing or preparing to produce * * * shall be re-imbursed such net losses as they may have incurred and are in justice and equity entitled to * * *."

Here is another "omnibus clause" in which Congress has directed the same thing in slightly different form.

Every condition imposed by this amendment and all regulations by the Secretary have been complied with by Defendant in Error, yet only a part of his net losses incurred have been adjusted and paid. The Secretary refuses to consider the item claimed as a loss suffered for the purchase of the mine, though it is conceded in the record that it was an expenditure made in good faith in preparing to produce manganese at the direct request of the Government.

"Net losses," or "net profits," are too well known in the business world to be the subject of debate.

It is quite evident that Congress intended that the "net losses," which it directed paid, should be determined by the Secretary in the ordinary, usual and customary way in the business world. It is equally obvious that Congress did not intend that the Secretary should pay the net losses claimed without full inquiry and investigation. It is clear that Congress intended that the Secretary should investigate the facts and determine the merits of each item claimed and only allow same, or such part thereof, as he should find was reasonably and justly incurred in good faith.

Here, again, is a general enacting clause so broad and complete that it includes each and every item of loss incurred in good faith. It must, therefore, be taken as an affirmation of its previous intent, to wit: that all losses suffered in good faith must be considered and adjusted by the Secretary.

On June 7, 1924, Congress again acted. An amendment was passed removing the restriction on the appropriation; in other words, relieving the Secretary of any responsibility as to the amount of the net losses that should be paid. The amendment did away with another foolish contention made by the Commission, to wit: "That Congress could not possibly have intended payments for losses on purchase of property, as it had not appropriated enough money to enable the Secretary to include that loss in the 'net losses' which he is obliged to adjust."

In any event, the Secretary is not now restricted in any sense by the amount of the appropriation. He is thus impliedly told—"Go ahead and adjust these claims, according to honesty and fair dealing, and Congress will take care of any appropriation necessary."

Congress went as far as it dared or could go respecting losses on purchase of real property. It had no right to tell the Secretary that its previous Act intended an inclusion of such losses. That would be nothing more nor less than an interpretation of its own Act, which is a power under the Constitution belonging exclusively to Federal courts.

> "The legislature cannot authoritatively declare what the law is or has been,—that is a judicial function and appertains to the courts."
>
> Sutherland, Stat. Cons., 2d ed., Sec. 357, p. 683.

There is no language in either amendment requiring an arbitrary rejection of losses suffered in good faith for the purchase of a mine. The exact contrary is necessarily implied.

IX.

Rejection of Such Losses, As a Matter of Law, Is Contrary to Every Principle of Accounting and Upsets a Long Established Business Custom.

"Net losses," or "net profits" are as well settled in accounting, and as well established and understood in the business world as are the general rules of interpretation in the law.

Such losses are arrived at with the same general factors, the only difference being that one appears on one side of the ledger and the other on the opposite side.

Given this claim as presented, any competent auditor could, within a few hours, strike off a trial balance and declare the net result, whether a "net loss" or a "net profit."

Whether it would be correct in fact depends, of course, on the truth of the several elements included in the claim.

In order to be certain that the claim made against the Government should only be allowed for the amount which Congress has directed shall be allowed, to wit: "net losses suffered," Congress imposed upon the Secretary the duty to investigate the various items included in the claim.

The duty of the Secretary is to ascertain and declare not only the truth or existence of each element claimed, but its relevancy and good faith as well. This done, the ascertainment of the actual "net loss suffered" is a mere matter of accounting which almost any High School student could declare.

But, in the case at bar, no person can arrive at the true "net losses suffered," because the Secretary has arbitrarily refused to consider and determine one of the con-

ditions precedent to the allowance of such element of loss in any case; hence, there is no finding to guide the auditor.

Once this court compels him to consider it and declare a just conclusion, the actual "net loss suffered," if any, follows almost as a matter of course.

The refusal to consider such loss on its merits is so utterly unreasonable that it can be nothing short of arbitrary or capricious, because it denies to the claimant legal rights which Congress has granted to him.

Under our Income Tax Law, it becomes necessary for many of us to return our "net income" and to pay tax accordingly.

"Net income," not considering the statutory exemptions, is nothing more nor less than "net profits." "Net losses" are but the converse of "net profits."

There can be no reasonable distinction in the method of declaring the one than the other.

In ascertaining "net income," the Treasury Department takes "net profits" on mining property and allows losses thereon, as a deduction.

Suppose R purchased mining properties and operated and produced. A few weeks before the Armistice he fell sick and was compelled to sell;—he did so at a profit. His properties cost $10,000; he sold for $40,000 and he broke even on the operating end. Query: Is not the $30,000, profit on the property itself, to be considered in determining his "net income" for Income Tax purposes? —Of course it is. It is too obvious to be denied and is done daily in the Treasury Department.

Now, suppose the same situation, but an operating loss of $20,000. The Treasury Department takes the profit on the mine and allows the operating loss, and the difference is his "net income," or "net profits" for tax purposes.

In the commercial world the question is settled by universal custom and is now beyond the point of discussion.

Why attempt something different in this case?

If a "net loss" for purchase of a property necessary to an enterprise can be arbitrarily denied regardless of its merits, then a rule is announced that will startle the business world and jeopardize thousands of contracts between citizens based on a premise of "net losses" or "net profits."

To avoid any such result, this court must interpret the Act, declare its meaning and then direct the Secretary to perform his duties under the court's interpretation of the law, *but not control the Secretary's discretion on the facts.*

X.

Depletion Allowance Is An Express Recognition By the Secretary that Losses for Property Are Allowable Under the Act.

In the adjustment of claims, the Secretary has allowed and paid to claimants who actually produced ore a fixed amount, to-wit: ten per cent of the value of the ore produced. This allowance was pursuant to a general rule and was uniform and applied to all alike, regardless of circumstances or conditions.

In this case, this allowance is labelled "royalty" (Trans. p. 6, Fol. 10), obviously a misnomer, as Defendant in Error claimed no loss for royalty paid;—he owned the property and paid no royalty.

In the administration of this Act it has been generally referred to as "depletion," and, on the face of this record

it is apparent that the word royalty is used in the same sense.

Mark you,—the allowance for "depletion" presently considered is an allowance made and paid to owners and is not to be confounded with royalty paid to another owner in lieu of rent and claimed as such.

This depletion, or royalty, is not included in the claim presented, nor in any other like claim. It has never been asserted in such claims as a part of the net losses suffered.

If it cannot be justified as an attempt to make an equitable adjustment of the losses suffered to the mine itself, it cannot be justified at all. The reason for its allowance has been repeatedly stated in decisions by the Commission and affirmed by the Secretary and is generally known.

It was allowed to claimants owning mines from which the ore was produced, as an equitable adjustment to compensate the claimant (owner) for the loss to his property by reason of ore extraction;—a recognition that the extraction of ore lessened the value of the mine itself; hence, to this extent, claimant had suffered a loss "by reason of producing."

This allowance by the Secretary is an admission that property losses are included in the enacting clause to the extent, at least, of ten per cent of the value of the ore removed.

If the allowance made and paid represented the actual net loss to the mine, *i. e.*, the net loss suffered by reason of producing, it could not be questioned. In other words, after ore removal and after serving the purpose for which it was acquired, to-wit: for war purposes, the mine had its original value less the ten per cent allowance, there could and would be no dispute, for it would be obvious that the allowance made would represent the actual net

loss suffered by reason of producing for the Government's use.

Here, again, enters the fallacy of an alleged discretion exercised in a matter not permitting of discretion. This allowance was made pursuant to a hard and fast general rule applicable to all alike, and, as this court has said, "here discretion ends."

The allowance made is nothing more nor less than an arbitrary allowance. Therefore, it cannot in all cases be just and equitable, even though, in cases of prior ownership, it may accomplish the purpose of the Act.

An arbitrary allowance for "depletion" in every claim as impliedly fixing the residual value of the mine, and thus establishing the "net loss," is a practical impossibility, and, in the mining industry, pure nonsense. Even to those having no knowledge of mining, it is known that mines differ radically and what may apply to one cannot apply to its neighbor. The value of any mining property is fixed by the tonnage and value of the ore in the mine. It may be that a particular mine, to be of commercial value, should have 100,000 tons of ore; another, a few thousand tons; and this value is also dependent upon other factors, to-wit: the nature and the character of the ore, and the value of the mineral (ore) remaining. The depleted value of a mine by the extraction of any given quantity of ore is a question of fact dependent upon various factors peculiar to each case, not applicable to any other property. Not in a single claim before the Secretary has any investigation ever been made to ascertain whether or not this ten per cent allowance would satisfy the amount of the net losses suffered by reason of producing at the request of the Government. This follows because the ruling is pursuant to a general rule applicable to all alike.

It ought to be perfectly obvious to the lay mind that an arbitrary allowance of ten per cent of the value of ore produced cannot be in all cases the equivalent of the net loss suffered to the mine by reason of producing at the Government's request. It is not possible by this method to justly and equitably declare the amount of the net loss suffered to the mine or for the mine.

Congress has directed the Secretary to adjust and allow the net losses suffered *by reason* of preparing to produce.

One reason for the Secretary's erroneous position is his failure to take into consideration and to give effect to certain words in the Act which are full of meaning and which have never been given any weight or effect, to wit:

"by reason of."

It is not the losses that claimant has suffered by reason of the depletion of his mine, but it is the "net losses" that he has suffered *by reason of preparing to produce.* Only when these words, "by reason of," are given their natural meaning can the intent of Congress be carried out.

At all times, this court must keep in mind that the only authority that the Secretary has, under this Act, is to pay net losses suffered *"by reason of."* He is not authorized, or permitted, to pay any other losses, and if the ten per cent depletion allowance is not actually the "net loss" suffered *"by reason of,"* he has exceeded his authority and has made illegal allowances.

To illustrate: Rives bought the property at the direct demand of the Government for the purpose of producing manganese. He paid $9,600 for the mine. He is preparing to produce and, in the meantime, produces ore of the value of $1,126.90.

After November 11, 1918, because of the cessation of war and the failure of the Government to administer the original War Minerals Bill, there was no market for

manganese and the mine had no value as a mine or for any other purpose.

His loss on the purchase of the mine by reason of preparing to produce is the sum of $9,600. For depletion, the Secretary allowed ten per cent of the ore produced, to wit: $112.69 (Tr. p. 6, fols. 9–10).

His prima facia net loss, therefore, is now the sum of $9,487.31, and it remains uninvestigated and unpaid.

But, returning to the pleadings, what do we find? Rulings in this case stating that the law does not authorize payment of such losses to any claimant; yet the Secretary allows in this claim a part of the loss that his official rulings state are not allowable in any case.

We are unable to explain the inconsistency. The allowance is important in the discussion, because it is a recognition *in part* that losses for property are allowable under the Act. Hence, it is apparent that a fixed ten per cent depletion allowance is neither just nor equitable, but is purely arbitrary and capricious.

The true net loss intended by Congress unless known to the Secretary can only be ascertained by investigation and mathematics in each case. The admission of Counsel as to the soundness of the theory of the petition is thus fortified by recognition and payment by the Secretary.

* * * * * * *

We submit that we have conclusively established that the decision of this court rests upon fundamental grounds not sustained by the record nor considered nor relied upon by the lower courts; that, while the decision is correct upon the facts assumed, it is in fact unsound and results in a denial of justice.

We most strenuously insist upon the right to rely on settled rules of pleading and law in determining the suffi-

ciency of the alleged plea as a defense and particularly that a demurrer admits only such facts as are well pleaded.

It is manifest, therefore, that upon the facts admitted by the demurrer, the writ was properly issued and the judgment of the Court of Appeals should be affirmed.

We see no distinction in principle between this and the Mosier case. Here, as in that case, we seek to enforce a right granted by Congress. It is the duty of this court to interpret the Act, declare the law and direct the Secretary to proceed accordingly, *but not to control his discretion in any way.*

Because of the foregoing, a re-hearing should be granted and the judgment of the Court of Appeals affirmed.

Respectfully submitted,

A. H. JARMAN,

Attorney for Defendant in Error.

United Bank and Trust Company Building,

San Francisco, Cal.

Comes now A. H. Jarman, attorney for Logan Rives, Defendant in Error, and certifies that this petition for re-hearing is made in good faith, and in his opinion is well taken in point of law and is not made for the purpose of delay.

A. H. JARMAN.